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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 463.

I. GOTO, H. MIYAZAWA, K. TAKIZAWA, ET AL.,
APPELLANTS,

vs.

JOHN C. LANE, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

BRIEF FOR APPELLANTS.

T. W. GREGORY,
HUBER & KEMP,
GREGORY & TODD,
Solicitors for Appellants.

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BRIEF FOR APPELLANTS.

Statement of the Case.

On the ninth day of May, A. D. 1923, the appellants filed their petition for a writ of habeas corpus in the United States District Court for the District of Hawaii. In their petition (Tr. 2-11) appellants set forth the following facts:

"1. That on the 27th day of May, A. D. 1920, your petitioners were, ever since have been and now are residents of the Territory of Hawaii.

"2. That ever since the 30th day of April, A. D. 1923, said petitioners have been and now are unjustly and unlawfully imprisoned and restrained of their liberty, in Oahu Prison, by one John C. Lane, High Sheriff of the Territory of Hawaii.

"3. That the cause or pretext of such detention and imprisonment, according to the knowledge and belief of petitioners, is as follows, to-wit:

"That on the 1st day of August, A. D. 1921, there was returned in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, by a Grand Jury thereof, a pretended indictment purporting to jointly charge each of your petitioners (and certain other persons) with the crime of conspiracy in the first degree. (A copy of said pretended indictment was thereto attached marked Exhibit 'A' and made a part thereof.)

"That on the 13th day of September, A. D. 1921, in said court and cause, your petitioners entered a plea of 'Not Guilty' to the said pretended indictment therein referred to.

"That on the 27th day of January, A. D. 1922, the Territory of Hawaii acting by and through its prosecuting officer the First Deputy City and County Attorney and with the written consent and approval of the Judge of the Court in which said pretended indictment was pending, undertook to and did without a resubmission thereof to the Grand Jury, change and amend said pretended indictment by striking therefrom the word 'or' wherever it occurs in said pretended indictment and inserting in lieu thereof the word 'and.' That said change and amendment was

brought about and accomplished by a written instrument executed by the Territory of Hawaii and your petitioners and approved by the Judge of the Court in which said pretended indictment was pending, which said written instrument was, on the 28th day of January, A. D. 1922, filed in said court and cause. (A copy of said written instrument was thereto attached and marked Exhibit 'B' and made a part thereof.)

"That on the 31st day of January, A. D. 1922, your petitioners were, and each of them was, placed on trial, by jury, in the aforesaid circuit court, on the charge made in said pretended indictment (Exhibit A) as altered and amended by the stipulation (Exhibit B); and on the 4th day of March, A. D. 1922, the jury in said cause returned a verdict of 'Guilty' against said petitioners and each of them.

"That on the 10th day of March, A. D. 1922, upon the judgment of 'Guilty' entered by the court following the verdict of said jury, as aforesaid, petitioners were and each of them was, sentenced by said court to be imprisoned in Oahu Prison at hard labor for a term of not less than four years nor more than ten years.

"That to the judgment and sentence of said court, your petitioners and each of them duly excepted on various grounds; among others, that said verdict, judgment, and sentence, were contrary to the law and the evidence.

"That these exceptions were duly presented to the Supreme Court of the Territory of Hawaii in the manner provided by the Statutes of Hawaii, and said court on the 26th day of April, A. D. 1923, overruled the said exceptions and each of them. That upon the presentation of said exceptions to said Supreme Court, your petitioners urged, as grounds for the sustaining of said exceptions, that they had been

denied the constitutional guarantees which are urged as grounds for the granting of the writ of habeas corpus therein prayed for.

"That on the 28th day of April, A. D. 1923, in execution of the judgment aforesaid, a mittimus was issued by Jas. J. Banks, Third Judge of the Circuit Court, First Judicial Circuit, of the Territory of Hawaii, a copy of which was thereto attached marked Exhibit 'C' and made a part thereof. That it is solely by virtue of said mittimus that each of your petitioners is now held in said Oahu Prison, as aforesaid, by John C. Lane, High Sheriff.

"4. That from the order of said Supreme Court of the Territory of Hawaii overruling said exceptions, your petitioners have no right of review by any other court; and have no means of relief from said illegal imprisonment except by writ of habeas corpus.

"5. That the imprisonment of your petitioners, as aforesaid, is unjust and illegal and contrary to and in violation of the provisions of the Constitution of the United States of America for the following reasons, to-wit:

"(*a*) That said petitioners were placed upon trial on said pretended indictment (Exhibit A) which wholly failed to charge petitioners with the commission of any crime against the laws of the Territory of Hawaii, because said pretended indictment failed to inform petitioners of the nature and cause of the accusation against them and each of them, as guaranteed by the Sixth Amendment to the Constitution of the United States.

"(*b*) That the aforesaid mittimus (Exhibit C) is wholly void because issued in the execution of a judgment which was wholly void because entered in a case

wherein petitioners had been held to answer for an infamous crime without the presentment or indictment of a grand jury, in violation of the Fifth Amendment to the Constitution of the United States.

"(*c*) That by reason of their being committed to and held in said Oahu Prison as aforesaid on a void mittimus, your petitioners have been and now are being deprived of their liberty without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

"(*d*) That by reason of their being tried upon a pretended indictment which wholly failed to charge the commission of any crime against the laws of the Territory of Hawaii, and being held to answer for an infamous crime without a presentment or indictment of a grand jury, your petitioners have been and now are being denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and have been deprived of their liberties without due process of law as guaranteed to them by the Fifth Amendment to the Constitution of the United States."

Exhibits "A" and "B" attached and referred to in said petition, being the indictment and stipulation amending the indictment, are, omitting formal parts, as follows:

EXHIBIT "A"—INDICTMENT.

"First Count: The grand jury of the First Judicial Circuit of the Territory of Hawaii do present that I. GOTO, H. MIYAZAWA, T. TSUTSUMI, F. KAWAMATA, K. FURUSHO, C. HOSHINO, Y. SATO, K. TAKIZAWA, T. BABA, E. YOKOO, S. TOMODA, C. ISHIDA, K. MIYA-

MURA, T. KOYAMA, one JINBO whose full and true name is to the grand jurors unknown, S. SATO, S. KONDO, H. FUJITANI, I. SAITO, J. MATSUMOTO and T. MURAKAMI at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 27th day of May, 1920, did maliciously or fraudulently combine, or mutually undertake or concert together to commit a felony, to-wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon one J. SAKAMAKI, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy or damage a certain house situated at Olaa, District of Puna, County of Hawaii, Territory of Hawaii, which said house was being occupied by the said J. Sakamaki as his place of abode, and that they, the said I. Goto, H. Miyazawa, T. Tsutsumi, F. Kawamata, K. Furusho, C. Hoshino, Y. Sato, K. Takizawa, T. Baba, E. Yokoo, S. Tomoda, C. Ishida, K. Miyamura, T. Koyama, one JINBO whose full and true name is to the grand jurors unknown, S. Sata, S. Kondo, H. Fujitani, I. Saito, J. Matsumoto and T. Murakami, did then and there and thereby commit the crime of conspiracy in the first degree contrary to the form of the statute in such case made and provided.

"Second Count: The grand jury of the First Judicial Circuit of the Territory of Hawaii do further present that I. Goto, H. Miyazawa, T. Tsutsumi, F. Kawamato, K. Furusho, C. Hoshino, Y. Sato, K. Takizawa, T. Baba, E. Yokoo, S. Tomoda, C. Ishida, K. Miyamura, T. Koyama, one JINBO whose full and true name is to the grand jurors unknown, S. Sato, S. Kondo, H. Fujitani, I. Saito, J. Matsumoto and T. Murakami, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this

Honorable Court on the 27th day of May, 1920, did maliciously or fraudulently combine, or mutually undertake or concert together to commit a felony, to-wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance in, at, under or against a certain house situate at Olaa, District of Puna, County of Hawaii, Territory of Hawaii, which said house was being occupied by one J. Sakamaki as his place of abode, for the purpose of inflicting bodily injury upon him, the said J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy or damage the said house, occupied by the said J. Sakamaki as aforesaid, and that they, the said I. Goto, H. Miyazawa, T. Tsutsumi, F. Kawamata, K. Furusho, C. Hoshino, Y. Sato, K. Takizawa, T. Baba, E. Yokoo, S. Tomoda, C. Ishida, K. Miyamura, T. Koyama, one Jinbo, whose full and true name is to the grand jurors unknown, S. Sato, S. Kondo, H. Fujitani, I. Saito, J. Matsumoto and T. Murakami, did then and there and thereby commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided."

EXHIBIT "B"—STIPULATION.

"Come now the Territory of Hawaii, by H. E. Stafford, Esq., First Deputy City and County Attorney of the City and County of Honolulu, Territory of Hawaii, and I. Goto, H. Miyazawa, H. Tsutsumi, K. Takizawa, K. Furusho, F. Kawamata, T. Baba, S. Tomodo, S. Kondo, S. Sato, H. Fujitani, T. Koyama, C. Ishida, C. Hoshino, and T. Murakami, in person and by their attorneys, Messrs. W. B. Lymer and F. M. Brooks, and hereby stipulate and agree that the indictment and all counts thereof heretofore found against the defendants above named by the

grand jury of this judicial circuit on the 1st day of August, 1921, may and shall be considered and understood as having been found and returned and as reading in the conjunctive instead of in the disjunctive and alternative, and that the said indictment and all counts thereof are not uncertain in that regard or on account thereof, and they, the said defendants, hereby waive any insufficiency in said indictment and all counts thereof by reason of said disjunctive and alternative pleading."

Upon the filing of the petition the court issued an order addressed to John C. Lane, High Sheriff of the Territory of Hawaii, to show cause why a writ of habeas corpus should not issue as prayed in the petition. On the 11th day of May, A. D. 1923, John C. Lane, filed his "Return to Petition for Writ of Habeas Corpus." The Return, omitting formal parts, was as follows:

"1. That he admits the allegations of Paragraph 1 of said petition.

"2. That he denies all and singular the allegations of Paragraph 2 of said petition, except the allegation that said petitioners are being held by your respondent; and by way of further return alleges that said petitioners and each of them is and they all are being held by your respondent pursuant to a valid judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii upon which judgment a valid and proper mittimus was issued; and that said mittimus was not issued until the exceptions of the above named petitioners and each of them had been heard by the Supreme Court of the Territory of Hawaii and said exceptions overruled.

"3. That your respondent admits the allegations of Paragraph 3 with the following exceptions:

"(*a*) That the indictment returned against said defendants was invalid or insufficient in any respect;

"(*b*) That the stipulation attached to said petition and marked Exhibit 'B' was or is an amendment or change of said indictment or that said indictment was in any way altered thereby;

"(*c*) That your respondent has not compared the said Exhibits or any of them with the originals on file in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii and therefore is unable to state whether the same be correct, but believes said exhibits so to be;

"(*d*) That your respondent denies the allegation contained in the final paragraph upon page 3 of said petition 'that it is solely by virtue of said mittimus that each of your petitioners is now held in said Oahu Prison as aforesaid by John C. Lane, High Sheriff'; and on the contrary, alleges that said petitioners are and each of them is held in Oahu Prison by your respondent by virtue of the valid judgment pronounced upon and against the petitioners and each of them by the Honorable Jas. J. Banks, Third Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, and that said mittimus attached to said petition and marked Exhibit 'C' is not sole authority by virtue of which said petitioners are held as alleged in said petition.

"4. Your respondent denies all and singular the allegations of this paragraph; and on the contrary alleges that the petitioners have and each of them has the right of reveiw by another court.

"5. Your respondent denies all and singular the allegations of Paragraph 5 of said petition." (Tr. 13-14.)

No further pleadings were filed, and, there being no issue of fact raised by the return, the matter was argued, and on the 5th day of June, A. D. 1923, the court filed its decision in writing (Tr. 16-20) declining to issue the writ of habeas corpus and ordering the proceedings dismissed. Thereafter on June 8th, 1923, a judgment was entered (Tr. 20) in compliance with the decision.

Petition for appeal accompanied by assignments of error was filed June 12th, 1923 (Tr. 20-23). The order allowing appeal was made the same day (Tr. 23) and citation on appeal issued (Tr. 24). Bond on appeal was approved June 14th, 1923, and filed June 15th, 1923 (Tr. 26).

The Facts.

There are no controverted facts. The allegations of the petition for the writ of habeas corpus were admitted by the return of the respondent except those in the nature of a statement of the legal effect of other facts stated. In other words, the facts alleged in the petition were admitted, but its conclusions were denied. The facts are that the petitioners, having been indicted by the grand jury of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on August 1, 1921, thereafter and before their trial began, entered into a stipulation with the Territory of Hawaii by which it was agreed that "the indictment and all counts thereof * * * may and shall be considered and understood as having been found and returned as reading in the

conjunctive instead of in the disjunctive and alternative." The stipulation was dated January 27, 1922, was approved by the Circuit Judge presiding at the trial on the same day, and was filed in the court and cause on January 28, 1922. (Tr. 8-9.) The defendants were thereafter tried on this amended indictment. Appellants alleged in Paragraph 3 of their application for the writ of habeas corpus (Tr. 3) that they were "placed on trial, by jury, in the aforesaid Circuit Court, on the charge made in said pretended indictment (Exhibit A) as altered and amended by the stipulation (Exhibit B)" and the respondent in his return (Tr. 13-14) admitted the said allegations of said Paragraph 3 with the exceptions, among others, "that the stipulation attached to said petition and marked Exhibit B was or is an amendment for change of said indictment or that said indictment was in any way altered thereby." Appellants were convicted and sentenced to serve not less than four nor more than ten years in Oahu Prison at hard labor. They are now incarcerated under that sentence and seek relief by the proceeding involved in this appeal.

Section 2268 of the *Hawaiian Revised Laws of 1915* provides that the term of the Circuit Court in the First Judicial Circuit shall be held "at Honolulu on the second Monday of January"; *Section 2270* provides that the term in the First Judicial Circuit may continue "until the time fixed by law for the commencement of the next succeeding term"; as heretofore shown, the indictment under consideration was found by the grand jury on August 1, 1921, and the stipulation in regard thereto was entered into on January 27, 1922, and was approved by the Court and filed on the following day; it therefore appears that the life of the grand jury

which found this indictment *necessarily expired by the second Monday in January, 1922, and before the stipulation was entered into.*

ARGUMENT.

I.

The imprisonment of appellants under sentence of conviction based on an indictment amended without resubmission to the grand jury is in violation of the Fifth Amendment to the Constitution.

This contention is made by *Specification of Error No. 2,* reading as follows:

> "That the United States District Court for the District of Hawaii erred in refusing to issue the writ of habeas corpus prayed for by petitioners, it appearing from the uncontroverted facts set forth in their application therefor that the circuit court of the first judicial circuit of the Territory of Hawaii, the court in which the petitioners were tried and convicted of an infamous crime, lost jurisdiction of the offense charged in the indictment and its proceedings therein were void for the reason that said indictment was by stipulation of the parties and with the approval of the court amended in a material respect prior to the commencement of the trial without a resubmission thereof to the grand jury which returned it, and said petitioners are therefore unlawfully restrained of their liberty without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States."

Appellants contend that the stipulation entered into constituted a change or amendment of the body of the indictment, and that the amendment had the legal effect of rendering void all proceedings had against the defendants thereon subsequent to the filing of the stipulation, because in contravention of the Fifth Amendment to the Constitution of the United States which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Appellants were indicted for a violation of *Section* 4084 of the *Hawaiian Revised Laws of 1915* reading as follows:

> "*First Degree; Punishment*—Conspiracy to commit, or to instigate to the commission of a felony; or to charge any one with felony; or to prevent, obstruct, defeat, or pervert the course of justice; or to forge or counterfeit or cheat to an amount exceeding $100, is in the first degree, and shall be punished by imprisonment at hard labor not more than ten years, or by fine not exceeding $1,000, in the discretion of the Court."

The sentence of the Court was that each of the appellants be imprisoned in Oahu Prison at hard labor for a term of not less than four years nor more than ten years.

They were therefore prosecuted for and convicted of an infamous crime within the meaning of the Fifth Amendment to the Constitution. *Ex Parte Wilson*, 114 U. S. 418; *Mackin* v. *United States*, 117 U. S. 348; *United States* v. *Moreland*, 258 U. S. 433; *Brede* v. *Powers*, decided by this Court October 22, 1923.

In *Ex Parte Bain,* 121 U. S. 1, the defendant, a cashier of a National Bank, was charged by indictment with having made a false report of the affairs of the bank "with intent to deceive the comptroller of the currency and the agent appointed to examine the affairs of said association, etc." Upon motion of the prosecuting attorney, the court ordered the words "comptroller of the currency and" stricken out of the indictment, after which the defendant was tried thereon and convicted.

In the case now before the Court we have a more formal proceeding—the proposed change being reduced to writing signed by the parties, approved by the court, and filed in the court and cause. Such a proceeding has been held to invalidate the indictment, the holding being in effect that the stipulation of counsel that portions of an indictment might be stricken out, added to, or ignored, constituted an amendment, and that after the filing of such a stipulation the defendants were no longer being tried upon the indictment of the grand jury.

In *Calvin* v. *State,* 25 Tex. 789, defendant was indicted for murder of a woman "named Vina, the property of the heirs of the said Robert Smith, deceased." Written stipulation was filed signed by the prosecuting attorney and by counsel for the defendant, authorizing the striking out of the words "the property of the heirs of the said Robert Smith, deceased." This stipulation was not approved by the Court, but the Supreme Court of Texas held that the indictment "has undergone such alteration that it will not support a conviction, although it may have been a good indictment before it was altered" (p. 796).

In *People* v. *Campbell,* 4 Parker's Cr. Rep. (N. Y.) 386,

defendant was indicted for the larceny of a dog of the value of $50.00, and of a collar of the value of $1.00. Defendant demurred, and upon presentation of the demurrer stipulation was filed, signed by counsel for the State and for the defendant, that the indictment should be considered as though it alleged that the dog was tame and domesticated and also that the allegation relative to the larceny of the collar should be disregarded. The court held that this could not be done, saying, "If the pleading they (referring to the grand jury) filed with the court could be remodelled by stipulations between the counsel, the defendant would not be tried upon the presentment of a grand jury, but rather upon the consent of the counsel." (P. 387.)

The respondent will not be heard to say that the prosecution in procuring the stipulation in question, and the circuit judge in writing his approval thereon, did an idle thing. It is clear, both from reason and authority, that this stipulation effected an amendment of the indictment just as much as if the word "or" wherever it occurs therein had been erased and the word "and" inserted in lieu thereof.

If we have established the proposition that the change in the indictment was accomplished by the stipulation, then the case falls within the rule of *Ex Parte Bain, supra,* and after the filing of the stipulation all proceedings of the circuit court were void for want of jurisdiction to proceed.

In *Ex Parte Bain* the trial court held that its action in permitting the change in the indictment should be sustained "upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made." In reply this Court, speaking through Justice Miller, said:

"The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. * * * If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed * * *." (Pp. 9-10, 11.)

"It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still

has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' *he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence.* The case comes within the principles laid down by this court in Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); Ex parte Parks, 93 U. S. 18 (23:787); Ex parte Wilson supra and other cases." (P. 13) [Italics ours.]

The only difference between the *Bain Case* and this case, so far as the question under discussion is concerned, is that Bain was tried in a Federal Court while appellants were tried in a Territorial court. If they had been tried in a State court this difference might have become important, but it will hardly be questioned that the *Fifth Amendment* to the Constitution applies to the Courts of the Territory of Hawaii. See *Thompson* v. *Utah,* 170 U. S. 343; *Hawaii* v. *Mankichi,* 190 U. S. 211; *Rasmussen* v. *United States,* 197 U. S. 516; *Queenan* v. *Territory,* 11 Okla. 261, 71 Pac. 218; *Territory* v. *Blomberg* (Ariz.) 11 Pac. 671; *Miller* v. *State* (Okla.) 106 Pac. 810.

> "No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution." (Concurring opinion of Mr. Justice Harlan in *Rasmussen* v. *United States, supra*, p. 529.)

We therefore submit that when the stipulation was filed the indictment was changed or amended, and that the court was no longer authorized to proceed against the defendants, because there was nothing before the court which they could be "held to answer." This being true, they are entitled to be discharged.

This is not a case where a constitutional right has been waived, but where a specific *prohibition* of the Constitution *has been violated.*

II.

Appellants should not be remitted to a remedy by appeal to this Court from the Supreme Court of the Territory of Hawaii, or by writ of error from this Court to the Supreme Court of Hawaii.

This contention is made by *Specification of Error No. 3*, which reads as follows:

> "That the United States District Court for the District of Hawaii erred in holding and ruling that the petitioners should be remitted to their remedy by appeal to the Supreme Court or by writ of error from that Court to the highest court of the Territory for the reason that no appeal lies to the Supreme Court nor can a writ of error therefrom to the Supreme Court

of the Territory of Hawaii be sued out in cases heard in said Supreme Court of the Territory of Hawaii on exceptions, as was the case here."

A. *Appellants had no right to an appeal or writ of error from the action of the Supreme Court of the Territory of Hawaii.*

After their conviction in the Circuit Court of the Territory of Hawaii, the defendants presented their case in the Supreme Court of the Territory on a bill of exceptions in the manner provided by the Statutes of Hawaii, and said court overruled their said exceptions (Tr. 3, 4; *Territory* v. *I. Goto et al.*, 27 Haw. copy of the opinion being filed with the Court).

From an order by the Supreme Court of the Territory overruling exceptions there is no right of appeal or writ of error, and no method of having the order reviewed in any other court except by writ of habeas corpus. *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429; *Spreckles* v. *Brown*, 212 U. S. 208.

B. *If a right to an appeal or writ of error from the action of the Supreme Court of the Territory of Hawaii existed, it has been lost, and had been lost when the application was made to the United States District Court for relief by habeas corpus.*

The jury returned a verdict in this case on March 4, 1922, and appellants were sentenced by the Territorial Circuit Court on March 10, 1922 (Tr. 3). Appellants excepted on various grounds, these exceptions were duly presented to the Supreme

Court of the Territory of Hawaii in the manner provided by the Statutes of Hawaii, and on April 22, 1923, the exceptions were overruled (Tr. 3 and 4 and opinion in *Territory* v. *Goto et al.* filed in this case). On April 28, 1923, a mittimus was issued (Tr. 4), and on April 30, 1923, appellants were imprisoned (Tr. 3). The petition for habeas corpus was filed in the United States District Court on May 9, 1923 (Tr. 2).

Section 2518 of Hawaii Revised Laws, 1915, reads as follows:

> "A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge, or magistrate, or by the decision of any court except in the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment."

The Supreme Court of Hawaii has repeatedly held, in civil as well as in criminal case, that no writ of error can be taken after the six months has elapsed. (*Territory* v. *Wills*, 26 Ha. 478-480; *Ami* v. *Parke*, 7 Ha. 214; *Hennessy* v. *Bolles*, 2 Ha. 184; *Bowler* v. *McIntyre*, 9 Ha. 306.)

As above shown, there can be no appeal to, or writ of error from, this Court where exceptions are overruled by the Supreme Court of Hawaii. After the exceptions had been overruled it was too late, under Section 2518 above set out, to take the case to the Supreme Court of Hawaii by writ of error, and besides that court, in dealing with the exceptions, had already decided against appellants the very point herein involved. When the petition for habeas corpus was filed in the United States District Court more than a year had elapsed since appellants had been sentenced by the Territorial Circuit Court.

Unless habeas corpus is available appellants are without a remedy, notwithstanding the prohibition of the Fifth Amendment of the Constitution and the provisions of §§ 755 and 761 of the Revised Statutes.

III.

Under the exceptional circumstances of this case the United States District Court of Hawaii was authorized to grant and should have granted the relief sought by appellants through habeas corpus.

Specifications of Error Nos. 4, 5 and 6 raised this general question and are as follows:

> "4. That the United States District Court for the District of Hawaii erred in holding and ruling that interference by it with the execution of judgments of the courts of the Territory of Hawaii on habeas corpus is not authorized unless there is something more than lack of jurisdiction in the Territorial court to pronounce judgment on account of the violation of the Constitutional rights of the individual.
>
> "5. That the United States District Court for the District of Hawaii erred in holding and ruling that interference by it with the execution of judgments of the courts of the Territory of Hawaii on habeas corpus is not authorized unless the authority or operation of the general government is affected directly or indirectly or its relations with foreign governments are involved.
>
> "6. That the United States District Court for the District of Hawaii erred in ordering and adjudging that the prayer of the petitioners herein for a writ of habeas corpus be denied and that their petition and

the proceedings thereon be dismissed for the reasons set forth in all of the foregoing assignments of error." (Tr. 22.)

The Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Sanborn, in *Stevens* v. *M'Claughry*, 207 Fed. 18 (delivered July 10, 1913), carefully reviewed the decisions of this and other courts and reached the conclusion, which we believe has not been qualified or questioned by the Supreme Court, that a person restrained of his liberty by the judgment of a court which is without jurisdiction is not barred from release by the writ of habeas corpus *because he might have secured such relief by a writ of error but failed to apply for it until it was too late.* In remanding the case to the District Court with instructions to discharge the prisoner, the circuit court of appeals said:

> " * * * to hold that one who is being deprived of his liberty for a long term of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of habeas corpus because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late is to rob the writ of the very purpose of its existence, the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in *Ex Parte Lange*, 18 Wall. at page 176, 21 L. ed. 872, that one who should be sentenced by a justice of the peace having jurisdiction to fine for a misdemeanor, or by a court of general jurisdiction on an indictment for a libel,

to imprisonment and death, *who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of habeas corpus. It is a writ of right.* The acts of Congress declare that the court to which the application for it is made 'shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto,' and 'shall proceed in a summary way to determine the facts of the case, * * * and thereupon to dispose of the party as law and justice require.' Revised Statutes, §§ 755, 761. The petitioner is being restrained of his liberty for five years by a judgment of a federal court which was beyond its jurisdiction and void.

"And our conclusion is that one who is being restrained of his liberty for many years by virtue of the judgment of a federal court which is beyond its jurisdiction and void may, and should, be relieved from that restraint by the proper federal court by means of the writ of habeas corpus, and that *he is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late.* The case at bar falls under the rule we have announced and within the class of cases governed by it, and the court below should have issued the writ and discharged the prisoner." (Italics ours.) (P. 29.)

It is true that the above was a case in which the court which exceeded its jurisdiction was a Federal court, but it is likewise true that the Circuit Courts and the Supreme Court of Hawaii are not *State*, but *Territorial* courts, whose judges are appointed by the President of the United States, and whose jurisdiction, powers, procedure, and the laws they

administer are absolutely controlled by Congress; they have not the dignity or independent power of a State court, and are in *no sense State courts;* they *exist only* by authority from Congress. It is also true that appellants in this case have sought relief from the United States Court by habeas corpus *only after* relief had been sought in vain from the highest Territorial court of Hawaii. (See opinion in this case by Supreme Court of Hawaii in advance sheets of opinions of that court, printed copy of which is filed herewith.)

In the minority opinion of Judge Hand in *Ex Parte Craig,* 282 Fed. 138, the same view as that of the Circuit Court of Appeals of the 8th Circuit is expressed in this language:

> "What may be urgency enough for the Supreme Court is not necessarily the same for one District Judge in reviewing another. Indeed, if the time had not long since expired within which a writ of error could be filed, I should be disposed to reverse the order on the ground that, though permissible, the writ was not necessary to accomplish justice, and should not have been granted. Nevertheless, this consideration does not go to the power to issue it, nor generally to the considerations which make the case an exception, but rather to the propriety of its issuance by a single judge. It seems to me an answer that if the writ now fails, the relator will lose, by a mistake in his remedy, any opportunity to review the case in any court. In view of this supervening situation, I think we should ignore the objection, and treat the case as though the application had been originally made to an appellate court." (P. 159.)

The following propositions are sound:

(1) *The United States Courts have the power to grant relief by habeas corpus even when a State court having the applicant in custody has not finally determined the case, but do not exercise that power except "in cases of peculiar urgency," or "under special circumstances requiring immediate action."* (*Markuson* v. *Boucher,* 175 U. S. 186; *Ex Parte Royall,* 117 U. S. 253.)

(2) *After there has been a final determination by a State court of last resort the general practice is to leave the defendant to his remedy of review by writ of error; but there is a discretion in a Federal court to which the application for writ of habeas corpus is made to determine "whether under all the circumstances then existing, * * * the accused shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of habeas corpus."* (*Ex Parte Royall,* 117 U. S. 253; *Ex Parte Frederick,* 149 U. S. 78; *Urquhart* v. *Brown,* 205 U. S. 183; *Appleyard* v. *Massachusetts,* 203 U. S. 224-226; *Riggins* v. *United States,* 199 U. S. 548-549.)

Because of its bearing on (1) and (2) above, special attention is asked to the following extract from the opinion in *Riggins* v. *United States,* 199 U. S. 547—

> "In *New York* v. *Eno,* 155 U. S. 89, it was held that Congress intended to invest the courts of the Union and the justices and judges thereof with power, upon writ of habeas corpus, to restore to liberty any person within their respective jurisdictions held in restraint by whatever authority in violation of the

Constitution or any law or treaty of the United States; that the Statute contemplated that cases might arise when the power thus conferred would be exercised during the progress of proceedings instituted in a State court against a petitioner on account of the very matter presented for determination by the writ of habeas corpus; but that the Statute did not imperatively require the circuit court by that writ to wrest the petitioner from the custody of the State officers in advance of his trial in a State court; and that while the circuit court had the power to do so, and could discharge the accused in advance of his trial, if restrained in violation of the Constitution, it was not bound in every case to exercise such power immediately upon application being made for the writ. The conclusion was that in a proper exercise of discretion, the circuit court should not discharge the petitioner until the State court had finally acted upon the case when it could be determined whether the accused, if convicted, should be put to a writ of error or the question determined on habeas corpus, whether he was restrained of his liberty in violation of the Constitution of the United States. * * * While special reasons may exist why this should be the rule in respect of proceedings in State courts which are not applicable to the cases in the courts of the United States, nevertheless we have frequently applied the same principles to such cases. * * * If judgment goes against petitioner and is affirmed by the court of appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. If, on the other hand, the writ does not lie to this court and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus." (Pp. 549-550.)

(3) *The discretion referred to is "a legal discretion to be controlled in its exercise by such principles as are applicable to the particular case in hand" (State* v. *Eno,* 155 U. S. 95), *and "to be subordinated to any special circumstances requiring immediate action" (Ex Parte Royall,* 117 U. S. 253).

(4) *In a case where there is no right to review the decision of the highest State court by appeal or writ of error there is no room for the exercise of discretion, and the Federal court applied to must grant the writ of habeas corpus, since by denying it the applicant would be cut off from his only method of asserting his rights under the Constitution and §§ 755 and 761 of the Revised Statutes.*

In *Markuson* v. *Boucher,* 175 U. S. 187, this Court, after stating the general rule—that, while the United States Courts have the power to grant writs of habeas corpus in certain classes of cases and discharge persons held under authority of a State, they ought not, except in cases of peculiar urgency, to discharge such persons in advance of their trial by the State courts, and even thereafter should leave them to their remedy by writ of error from this Court—closes its opinion by saying that the question does not "arise what right appellant would have had to petition relief from the District Court if his remedies against the judgment of the State court had ceased to exist." In the case now before the Court the remedies referred to (the right to review the decisions of the Territorial courts by writ of error) *"had ceased to exist"* and the very condition which the Court safeguarded from the effect of the above decision has arisen.

Again in *In Re Chapman,* 156 U. S. 218, the Court, after stating the general rule above set out, said: "If on the other

hand, a writ of error does not lie to this Court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of habeas corpus." (This language was subsequently quoted with approval in *Riggins* v. *United States,* 199 U. S. 550.) In the case now before the Court a writ of error *did not lie* to the Territorial Courts of Hawaii at the time the habeas corpus proceedings were instituted, as shown under II hereof.

In the celebrated case of *Frank* v. *Mangum,* 237 U. S. 329, this Court considered and decided the constitutional questions raised; the case was brought here in exactly the same way that the case now before the Court comes with the single exception that in the *Frank Case* he made an unsuccessful effort to procure a writ of error to the Georgia Court of last resort before seeking the writ, while in this case appellants, after an unsuccessful effort to procure relief from the Supreme Court of Hawaii in a proceeding from which no writ of error from this Court lay, sought the benefits of a writ of habeas corpus *without making a perfectly futile effort to secure a writ of error;* appellants are entitled to consideration here for the same reason Frank was—*because this is the only method left by which they can test their constitutional and statutory rights.*

(5) *This Court has approved relief by habeas corpus in a number of cases in which the circumstances calling for it were less persuasive than in this case.*

Appleyard v. *Massachusetts,* 203 U. S. 224-226, was a case in which the Governor of Massachusetts issued a warrant for the arrest of Appleyard and his delivery to an agent

of the State of New York; after his arrest Appleyard applied for a writ of habeas corpus to the Supreme Judicial Court of Massachusetts, which denied the application and remanded the petitioner to the custody of the agent of New York; Appleyard applied to the Circuit Court of the United States for a writ of habeas corpus, claiming that the warrant of the Governor and order for his delivery were contrary to the Constitution of the United States; the Circuit Court discharged the writ and an appeal was taken to the Supreme Court. In disposing of the case this Court said that "regularly the accused should have prosecuted a writ of error to the Supreme Judicial Court of Massachusetts before invoking the jurisdiction of the Supreme Court of the United States upon habeas corpus (citing a number of decisions), but, in view of the long time which has elapsed since the Governor of New York made his requisition for the surrender of the accused, and as the case is one which the public interests demand should be speedily determined, we think the ends of justice will be promoted if we proceed to a final judgment on this appeal." (Pp. 224-226.)

In *Ex Parte Medley*, 134 U. S. 160, the prisoner had been convicted of murder and sentenced to be executed by a trial court of the State of Colorado. On application to this Court for a writ of habeas corpus it discharged the prisoner on the ground that the statute of Colorado under which he had been sentenced was unconstitutional, being an *ex post facto* law. This was done notwithstanding the fact that no appeal had been taken to the appellate court of Colorado from the sentence of the trial court of that State, and the fact that no effort was made to review the decision of the State Court by appeal to or writ of error from this Court.

This Court also granted the relief sought without requiring the prisoner to *first seek* release by habeas corpus from the Circuit Court of the United States, on the showing that the latter Court, "in a similar case, involving the same points, decided adversely to petitioner" (p. 162); in our case the Supreme Court of Hawaii had decided the exact points adversely to petitioner *in this very case,* which is the best of reasons why appellants should not have been required to *again* go to that Court for relief.

In *Ex Parte Savage,* 134 U. S. 176, the same facts were involved as in the *Medley Case,* and the same order entered.

In Re Heff, 197 U. S. 488, was a case in which this Court discharged the prisoner on direct application made to it for habeas corpus, on the ground that the District Court of the United States for Kansas had imprisoned the applicant in a case in which it had no jurisdiction. This was done although the applicant had *made no effort* to review the action of the District Court by any appellate proceedings. Justice Brewer also calls attention (p. 490) to the fact that the Court of Appeals of the 8th Circuit had, *in another case, decided adversely to applicant the question involved* and for that reason he had by petition for habeas corpus brought the suit *directly to this Court.*

In *Hawaii* v. *Mankichi* (Vol. 1 Estee's Reports United States District Court of Hawaii, p. 304) [1902], application for writ of habeas corpus was filed in the United States District Court charging that Mankichi was convicted of manslaughter in the Circuit Court of the Territory *on presentment, without intervention* of a *grand jury,* and on verdict of nine of twelve jurors in violation of Amendments V, VI and VII of the Constitution of the United States. The first

contention of the Territory was that the District Court had no jurisdiction *"because a writ of error should be sued out of the Supreme Court of the United States by petitioner," that the United States Court ought not to interfere, and that the case was not one of sufficient gravity to call for action by the District Court on habeas corpus.* (P. 305.)

The District Judge held that the conviction was void and discharged the prisoner.

The Supreme Court (*Territory of Hawaii* v. *Mankichi,* 190 U. S. 197) passed on the merits of the case *without questioning the right of the District Court to assume jurisdiction.*

In *Minnesota* v. *Barber,* 136 U. S. 313, Barber was convicted before a Justice of the Peace in Minnesota and sentenced to serve thirty days in jail for selling in Minnesota beef slaughtered in Illinois, and not inspected in Minnesota. The Circuit Court of the United States for the District of Minnesota discharged the prisoner on habeas corpus because the statute of the legislature of Minnesota under which he was convicted was unconstitutional. There was no appeal from the decision of the Justice of the Peace to any State court, and no effort to carry the case to this Court by writ of error. Speaking through Justice Harlan, the Supreme Court held the statute unconstitutional, and affirmed the judgment discharging the prisoner, who was treated under the facts as entitled to the writ as a matter of course and without reference to any special circumstances.

Thomas v. *Loney,* 134 U. S. 372, was a case where a man was held under warrant of arrest issued by a Justice of the Peace of Richmond, Virginia, charging him with perjury in a Congressional contested election case. The Circuit Court

of the United States on writ of habeas corpus held that the State courts of Virginia had no jurisdiction and discharged the applicant. This Court affirmed the case though no steps had been taken to review the action of the Virginia Court by appellate proceedings.

In the celebrated case of *Cunningham* v. *Neagle*, 135 U. S. 1, Neagle was held under warrant of arrest for murder issued from a State Court. He was discharged on writ of habeas corpus by the Circuit Court, and the case affirmed, it being held that in taking the life of Terry the prisoner was acting under authority of the law of the United States. No action was taken, before the application for writ of habeas corpus, to review by writ of error or other appellate proceedings the action of the State Court.

In *Minnesota* v. *Brundage*, 180 U. S. 499, this Court held that an applicant for the writ of habeas corpus to a United States Circuit Court who was held under warrant from a municipal court of the State of Minnesota and who had not sought a reversal of the judgment of the municipal court by appeal to the higher courts of the State did not present a case "of urgency within the meaning of our decisions" and did not give an adequate reason for not so appealing; the court then found and ordered (pp. 501-502 and 505) that the application for the writ should be denied "without prejudice to a renewal of the same after the accused had availed himself of such remedies as *the laws of the State* afforded for a review of the judgment in the State Court of which he complains," thereby indicating its recognition of the right here insisted on by appellants of applying to the Federal Court for the writ of habeas corpus after every effort had been made to secure relief by appeal to the *territorial* court of last resort.

In the recent decision of this Court in *Craig* v. *Hecht,* decided November 19th, Craig had the right of appeal from the order of Judge Mayer, and, through mistake or design, failed to take advantage of this remedy. He applied for a writ of habeas corpus to a Circuit Judge sitting as a District Judge; the latter ordered Craig discharged. The habeas corpus proceedings were carried to the Circuit Court of Appeals and thence to this Court, which held that the Circuit Court of Appeals had jurisdiction of the appeal, and then proceeded to dispose of the jurisdictional issues involved, notwithstanding the fact that Craig had failed to pursue the ordinary course of having Judge Mayer's action reviewed by an appellate court.

(6) *A conviction and punishment under an unconstitutional law is no more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law.*

Ex parte Nielson, 131 U. S. 176, was an appeal from a final order of the First Judicial District Court of the Territory of Utah denying appellant's application for a writ of habeas corpus. He had theretofore pleaded guilty to living with more than one woman at the same time and had served his sentence. He was afterwards convicted on a charge of adultery committed with one of the two women named in the former charge. Upon being convicted and delivered into the custody of the Marshal, he presented to the court his petition for a habeas corpus setting forth the facts. The writ being denied, he appealed to the Supreme Court. Discussing the question of whether or not habeas corpus was his remedy, the court said:

"The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction, which could not be questioned collaterally, as it would have to be on habeas corpus. But there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of Ex parte Lange, 85 U. S. (18 Wall.) 163, (21:872), and Ex parte Siebold, 100 U. S. 371 (25:717), and in several other cases referred to therein. * * *."

"In the present case, it is true, the ground for the habeas corpus was not the invalidity of an Act of Congress under which the defendant was indicted, but a second prosecution and trial for the same offense, contrary to an express provision of the Constitution. In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why *a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant.* This was the case in Ex parte Lange where the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did. It was the same in the case of

Snow: The court had authority to hear and determine the case, but we held that it had no authority to give the judgment against the prisoner. *He was protected by a constitutional provision, securing to him a fundamental right.* It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment. The distinction between the case of a mere error in law, and of one in which the judgment is void, is illustrated by the case of Ex parte Parks as compared with the cases of Lange and Snow. In the case of Parks there was an alleged misconstruction of a statute. We held that to be a mere error in law, the court having jurisdiction of the case. In the cases of Lange and Snow, there was a denial or invasion of a constitutional right. A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. * * *."

"With regard to the power of discharging on habeas corpus, it is generally true that, after conviction and sentence, the writ only lies when the sentence exceeds the jurisdiction of the court or there is no authority to hold the defendant under it. In the present case, the sentence given was beyond the jurisdiction of the court, *because it was against an express provision of the Constitution, which bounds and limits all jurisdictions.*" (Pp. 183-186) [Italics ours.]

The Court's attention is called to the cases of *Ex Parte Wilson,* 114 U. S. 417, *Ex Parte Lange,* 85 U. S. 163 and *Ex Parte Yarborough,* 110 U. S. 651.

Ex Parte Wilson was a case in which Wilson applied directly to this Court for a writ of habeas corpus charging that a District Court of the United States had held him to answer for, and had convicted him of, an infamous crime upon an *information filed by the District Attorney* in violation of the Fifth Amendment to the Constitution. The Supreme Court held that the District Court, in the absence of action by a grand jury, was without jurisdiction, and ordered the prisoner discharged.

Ex Parte Lange was a case in which Lange applied directly to this Court for a writ of habeas corpus claiming that he was imprisoned under an order of a Circuit Court of the United States in violation of his constitutional rights. The Supreme Court directed the writ to issue, discharged the prisoner, and in so doing said:

> *"There is no more sacred duty of a court than,* in a case properly before it, *to maintain unimpaired those securities for the personal rights of the individual* which have received for ages the sanction of the jurist and the statesman; *and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied.* Without straining either the Constitution of the United States, or the well settled principles of the common law, we have come to the conclusion that the sentence of the circuit court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged." (P. 178.) [Italics ours.]

In *Ex parte Yarborough,* the court said:

> "It is equally well settled that when a prisoner is held under a sentence of any court of the United

States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement." (P. 653.)

Respectfully submitted,

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IN THE

Supreme Court of the United States.

October Term, 1923.

No. 463.

I. GOTO, H. MIYAZAWA, K. TAKEKAWA, et al. *Appellants*,

vs.

JOHN C. LANE, Sheriff of the Territory of Hawaii, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE.

ROBERT P. QUARLES,
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IN THE

Supreme Court of the United States.

October Term, 1923.

No. 463

I. GOTO, H. MIYAZAWA, K. TAKIZAWA, et al. *Appellants.*

vs.

JOHN C. LANE, HIGH SHERIFF OF THE TERRITORY OF HAWAII, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The appellants on May 9, 1923, filed in the District Court of the United States for the District of Hawaii a petition for a writ of habeas corpus. On June 8, 1923, after a hearing on the petition and return, the District Court denied the prayer for the writ and dismissed the petition and proceeding. From this judgment, the appellants took their appeal to this Court.

The facts show that on August 1, 1921, a grand jury of the 1st Judicial Circuit Court of the Territory of Hawaii, returned an indictment, against the appellants and others, charging conspiracy in the first degree. The indictment contained two counts. The first count charged that they "did maliciously or fraudulently combine or mutually undertake or concert together to commit a felony, to-wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon one J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy or damage a certain house situate at Olaa....., County of

Hawaii, Territory of Hawaii, which said house was being occupied by the said J. Sakamaki as his place of abode, and they..... did then and there commit the crime of conspiracy in the first degree, contrary to the form of the statute in such case made and provided." The second count charged that they "did maliciously or fraudulently combine, or mutually undertake or concert together, to commit a felony, to-wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance in, at, under or against a certain house situate at Olaa....., which said house was being occupied by one J. Sakamaki as his place of abode, for the purpose of inflicting bodily injury upon him, the said J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy or damage the said house," et cetera. (Tr. pp. 5-7.)

Pleas of not guilty were entered to the indictment on September 13, 1921, and on January 27, 1922, a stipulation was signed by the prosecuting officer, representing the Territory of Hawaii, and the defendants in the conspiracy case, as well as by the attorneys of those defendants. This stipulation was not approved by the court, but by the judge, acting apparently in chambers, several days in advance of the trial, and was filed on January 28, 1922. The stipulation which was headed "Conspiracy in the First Degree," provided "that the indictment and all counts thereof heretofore found against the defendants above named by the grand jury of this Judicial Circuit on the 1st day of August, 1921, may and shall be considered and understood as having been found and returned and as reading in the conjunctive, instead of in the disjunctive and alternative, and that the said indictment and all counts thereof are not uncertain in that regard or on account thereof, and that, the said defendants, hereby waive any insufficiency in said indictment and all counts thereof by reason of said disjunctive and alternative pleading."

No order was ever made by the court that the indictment be amended in any particular.

It was claimed in the petition for the writ of habeas corpus, that this stipulation undertook to and did, without a re-submission to the grand jury, change and amend the indictment by striking from it the word "or" whenever it occurred in that document, and inserting in lieu thereof the word "and." (Tr. p. 3.) In the return to the petition for the writ, however, it was denied that the stipulation was or is an amendment or change of the indictment, or that the indictment was in any way altered thereby. (Tr. p. 13.)

The petitioners were placed on trial on January 31, 1922, and were found guilty on March 4, 1922. (Tr. p. 3.) It does not appear anywhere in the record that the stipulation of January 27, 1922, was ever placed before the trial jury or called to its attention. On March 10, 1922, defendants were sentenced by the territorial trial court (Tr. p. 3), and on April 28, 1923, were committed to the custody of the High Sheriff of the Territory of Hawaii, under a mittimus that set out the two counts of the indictment as they were found by the grand jury on August 1, 1921. The mittimus contained no reference whatever to the stipulation entered into on January 27, 1922. (Tr. pp. 9-11.) After the issuance of the mittimus, the case was taken to the Supreme Court of the Territory of Hawaii by the defendants on bill of exceptions, and on April 26, 1923, the exceptions were overruled by that court. (Tr. p. 4.) It was not claimed by the exceptions that the indictment had been amended or that it was insufficient. See *Territory* vs. *Goto, et al.*, 27 Hawaiian Reports, 65, 69.

By the petition for the writ of habeas corpus it was also claimed that from the order of the Supreme Court of the Territory overruling the exceptions, the petitioners have no right of review by any other court, and have no means of

relief from their alleged illegal imprisonment, except by a writ of habeas corpus, (Tr. p. 4), but the petition for the writ does not show that under the laws of Hawaii, a writ of error lies from the Supreme Court of the Territory to the trial courts, and that upon such writ of error, the Supreme Court of the Territory may enter a final judgment that would be subject to review by the federal courts in a proper case.

The United States District Court for Hawaii denied the application of the petitioners for a writ of habeas corpus upon the theory that although it had authority to discharge a person in custody under a judgment of a territorial court in violation of the Constitution and laws of the United States, such authority should be exercised only in exceptional or peculiarly urgent cases, and that this was not such a case. (Tr. pp. 17-20.)

In commenting on what occurred before the Supreme Court of Hawaii upon the argument on the bill of exceptions, that court in *Territory vs. Goto*, 27 Hawaiian Reports, 65, 69, said:

"The attorneys who represented the defendants throughout the trial have brought the case here on exceptions, *none of which go to the insufficiency of the indictment.* At the oral argument on the exceptions before this court, one of the attorneys who conducted the trial on behalf of defendants and who had filed a brief herein in support of his exceptions, expressly stated that he considered himself bound by the stipulation entered into by him on behalf of the defendants, that he did not propose to and would not now argue that the indictment against defendants was in any manner defective or insufficient, and that any attack that might now be made against the sufficiency of the indictment was entirely without his support or approval. *Notwithstanding the stipulation and the attitude of the attor-*

neys who had appeared for the defendants throughout the trial, another attorney appearing in this Court for the first time as an attorney for defendants, has filed herein a supplemental brief, in which the contention is made that the indictment is not sufficient to charge defendants with the commission of any crime, and that the verdict and judgment of the court based on such indictment are contrary to the law for that reason. This attorney at the oral argument contended that the stipulation entered into between the other counsel for defendants and the prosecution was equivalent to an amendment of the indictment and that no amendments to an indictment returned by a grand jury are permissible. He also argued that the attempted waiver is ineffectual."

In rendering its opinion on the question involved, the Hawaiian Supreme Court said:

"Passing without further comment, the very unusual situation of defendants, who in one and the same breath and in the same proceeding, say through one attorney that they stand by their waiver and refuse to argue in derogation of the indictment, and urge through another attorney that the indictment is bad, *we are of the opinion that the stipulation in question can not be construed as amounting to an amendment to the indictment. The trial court did express its approval of the stipulation and of the waiver contained therein, but it did not amend the indictment or attempt or purport to do so.*"

After discussing the legal effect of an indictment that charges the offense in the disjunctive instead of the conjunctive, the Supreme Court of Hawaii points out on page 74 of the opinion that even the courts that hold that such a method of pleading charges no offense, concede that the rule is not without qualifications. The merits of the matter, said the Supreme Court of Hawaii, need not be considered. It is based on a technicality of debatable substan-

tiality, and when, as in the case at bar, the defendants and their able counsel have solemnly said to the court, after ample time for study and reflection, that they understand the indictment, that the presence of the word "or" does not mislead them, nor in any wise embarrass them in the defense, and that the indictment fully informs them of the nature and details of the charge against them, the alleged insufficiency or defectiveness of the indictment is one which may be constitutionally waived, and any other construction would be an affront to justice and commcn sense.

BRIEF OF THE ARGUMENT.

I.

THE INDICTMENT AS FOUND BY THE GRAND JURY WAS SUFFICIENTLY CERTAIN AS A MATTER OF LAW AND WAS NOT AFTERWARDS CHANGED, ALTERED OR AMENDED IN ANY PARTICULAR.

The offense of conspiracy in the first degree with which the appellants were charged is a statutory one in Hawaii. Section 4076 of the Revised Laws of Hawaii, 1915, provides as follows:

"A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate anyone thereto, or charge anyone therewith; or to do what plainly and directly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another."

Conspiracy in the first degree is defined by Section 4084 of the Revised Laws of Hawaii, 1915, as follows:

"Conspiracy to commit or to instigate to the commission of a felony; or to charge anyone with felony; or to prevent, obstruct, defeat, or pervert the course of justice; or to forge or counterfeit or cheat to an amount exceeding one hundred dollars, is in the first degree and shall be punished by impri-

sonment at hard labor, not more than ten years, or by fine not exceeding one thousand dollars, in the discretion of the court."

The conspiracy now under consideration was one to commit a felony, and the particular felony to which it related was the statutory offense set out in Section 4028 of the Revised Laws of Hawaii, 1915, relating to the unlawful use of explosives. This section reads as follows:

"Any person unlawfully using dynamite or other explosive chemical or substance, for the purpose of inflicting bodily injury upon, or to terrify and frighten any person, or to injure or destroy any property or damage the same in any manner, shall be liable upon conviction to pay a fine of not less than two hundred and fifty dollars, nor more than five thousand dollars, and to imprisonment at hard labor for a term not to exceed twenty years."

In connection with the administration of the criminal law in the Territory of Hawaii, there are certain statutory definitions and rules of construction that are applicable in the present case.

The word "malice" is defined in Section 3663 of the Revised Laws of Hawaii, 1915, as follows:

"*Malice* in respect to the commission of any offense, except in cases where it is otherwise expressly provided or plainly intended, *includes* not only hatred, ill-will, and desire of revenge, but cruelty of disposition or temper; and also *a motive or desire of gain or advantage to the offender or another, or of doing a wrong or injury to any person or persons,* or to the public. It also includes the acting with a heedless, reckless disregard or gross negligence of the life or lives, the health, or personal safety, or legal rights or privileges of another or others, many or few, known or unknown; *also, the willful violation of a legal duty or obligation and willful contravention of law.*"

Section 3791 D of the Revised Laws, found in Act 215 of the Session Laws of Hawaii, 1915, page 307, provides that in an indictment for an offense which is constituted of one or more of several acts, or which may be committed by one or more of several means, or with one or more of several intents, or which may produce one or more of several results, two or more of such acts, means, intents or results *may be charged in the alternative.*

Section 3791 F of the Revised Laws, Act 215, Session Laws of Hawaii, 1915, provides that no indictment is invalid by reason of any repugnant allegation contained therein, provided that an offense is indicated under Section 3791 I. Section 3791 I reads as follows:

"SUFFICIENCY OF AVERMENTS AS TO OFFENSE AND TRANSACTION. In an indictment the offense may be charged either by name or by reference to the statute defining or making it punishable; and the transaction may be stated with so much detail of time, place and circumstances and such particulars as to the person (if any), against whom, and the thing (if any), in respect of which the offense was committed, as are necessary to identify the transaction, to bring it within the statutory definition of the offense, to show that the court has jurisdiction, and to give the accused reasonable notice of the facts."

These definitions and rules of construction were intended to minimize the effect of fine-spun technicalities, while retaining at the same time all the substantial rights of a defendant in a criminal case. Their purpose is the same as that intended for the guidance of the federal courts when Congress provided by the Act of June 1, 1872, c. 255 sec. 8, 17 Stat. at Large 198, that no indictment found and presented by a grand jury in any district or other court of the United States, should be deemed insufficient, nor should the trial, judgment, or other proceeding thereon be affected by

reason of any defect, or imperfection in matter of form only, which did not tend to the prejudice of the defendant.

In a charge of conspiracy, the conspiracy is the gist of the crime, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit is all that is necessary in stating the object of the conspiracy.

Williamson vs. U. S. 207 U. S. 425, 447.

In passing on an indictment for conspiracy, this Court in the case of *Frohwerk vs. U. S.* 249 U. S. 204, said:

"It is said that the first count is bad because it does not allege the means by which the conspiracy was to be carried out. But a conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose. That purpose could be accomplished or aided by persuasion as well as by false statements, and there was no need to allege that false reports were intended to be made, or made. *It is argued that there was no such allegation of intent, but intent to accomplish an object can not be alleged more clearly than by stating that parties conspired to accomplish it.*"

The use of the word "or" where perhaps the word "and" would have been the better expression in the indictment now under consideration, did not make the instrument bad. "Or," has many times been construed by the courts to be synonomous with "and" or convertible into "and," and repugnant words do not necessarily vitiate a charge, but may be treated as surplusage, where in fact a defendant is actually advised of the nature and cause of the accusation.

Kennedy vs. Haskell, 67 Kan. 612, 616, 73 Pac. 913.

State vs. Gilbert, 13 Vt. 647, 651.

State vs. Bailey, 107 Kan. 637, 193 Pac. 354.

State vs. Satterfield, 29 Del. 443, 100 Atl. 473.

State v. Dyer, 67 Vt. 690, 32 Atl. 814.

It should be borne in mind that in the indictment in this case, the crime, itself, conspiracy in the first degree, is nowhere stated in the alternative. The alternative allegations refer only to the intent with which the crime was committed and the means intended to be used for the purpose, and whether the language be construed in the disjunctive or in the conjunctive, only one offense is charged. A very different situation would have arisen if separate offenses had been charged in the disjunctive. The use of the words "maliciously or fraudulently," if repugnant could be rejected as surplusage in view of the subsequent detailed description of the objects of the conspiracy which made it clear and beyond question. When we consider those objects, it is wholly immaterial whether they are stated in the conjunctive or disjunctive. When the conspiracy was entered into it may not have been exactly determined what forms the unlawful acts should take or whether they were for the purpose of inflicting bodily injury on Sakamaki, or to terrify and frighten him, or to injure, destroy, or damage his house. The conspirators may have intended either, or all, or any of these things, and a conspiracy to do one of them, or one or the other, or all of them would render the defendants equally guilty. The gist of the offense in this case was not the destruction of the house, nor the infliction of bodily injury upon Sakamaki. The gist of the offense was the conspiring together to commit a felony, the particular felony in this case being the one embraced within the provisions of the law relating to the unlawful use of explosives. The indictment charges in effect that although in general the means to be employed and the purposes to be accomplished were contemplated by the conspirators, the selection of those means and the unlawful use to which they were to be put, were optional and could well be left to chance, or made to depend upon subsequent developments. Here

the indictment is conspiracy, and no matter how many crimes may have been contemplated by the conspirators, or how many or how few objects they had in mind, the conspiracy to commit such crimes was but a single offense.

The whole question resolves itself into one as to whether by the indictment the conspirators in this case were, in the language of the Sixth Amendment to the Constitution, "informed of the nature and cause of the accusation." The indictment in this case conformed to all of the rules laid down by this Court in the case of *Burton vs. United States,* 202 U. S. 344 at page 372. The accused were informed with reasonable certainty by the indictment of the nature and cause of the accusation against them, the averments of the indictment were sufficient to enable the defendants to prepare their defense, and in the event of an acquittal or conviction, the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused were not entitled to more, nor could they demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without ambiguity disclosed all of the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution and according to the rules of pleading, the defendants were informed of the nature and cause of the accusation against them.

To claim that the indictment as found by the grand jury was amended by the stipulation of January 27, 1922, is to misinterpret entirely the language of that stipulation. It nowhere purported to amend or change in any manner any portion of the indictment as found. It merely set out the understanding of all of the parties, individually and by their attorneys, of the language employed in the indictment. The defendants said that the language might be considered and

understood as reading in the conjunctive, that it did not render the indictment uncertain on account of the disjunctive "or" having been used, and that they waived any insufficiency in the indictment and all of its counts by reason of the disjunctive and alternative pleading. The stipulation had no greater effect on the indictment than would have resulted from the application to the indictment by the court of the statutory definitions and rules of construction that have already been referred to in this brief relating to repugnancy and alternate pleading, for without the stipulation the territorial courts applying those definitions and rules of construction would have accomplished the same results had the matter never been made the subject of stipulation. The indictment was never amended as a matter of fact. It does not appear that the trial jury ever knew of the existence of the stipulation, and the mittimus makes no mention of it, no order was ever asked for or made by the court amending the indictment, and it was never at any stage of the proceedings considered to have the effect of amending the indictment until the suggestion was made in the Supreme Court of the Territory when the matter was there on bill of exceptions, and then the claim was made by counsel who up to that time had had no connection with the case.

The most that can logically be claimed for the stipulation is that it either constituted a waiver of supposed defects, or placed a legal construction upon the language used in the indictment. If, as a matter of fact there were no defects in the indictment, a waiver of defects would have no force, and if an attempt was merely made to place a legal construction upon it, such legal construction would not be binding either on the trial or the appellate court.

H. Hackfield & Co. Ltd. v. U. S., 197 U. S. 442.

In re Lewers & Cooke, Ltd., 19 Hawaiian Reports, 47.

This case is radically different from that of *Ex parte Bain*, 121 U. S. 1, which is relied upon by counsel for the appellants in their brief. The Bain case was an original application to this Court for a writ of habeas corpus. The petitioner had been convicted, not in a territorial or state court, but in a circuit court of the United States, under Section 5209 of the Revised Statutes, of having made a false report or statement as cashier of a national bank. The indictment contained an allegation that petitioner's acts were *"with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of the bank."* A plea of not guilty was withdrawn in the lower court and a demurrer interposed which was sustained. *The court then, on motion of counsel for the United States, ordered that the indictment be amended by striking out the words, "the Comptroller of the Currency and,"* as surplusage. The trial of the petitioner was then taken up under a severance and he pleaded not guilty and was convicted. He moved for a new trial and in arrest of judgment, both of which were overruled. This Court on the habeas corpus proceeding granted the writ on the theory that the trial court had no right to strike out the words named from the indictment, and that as amended the indictment was not that of the grand jury, the petitioner had been deprived of his rights under the Fifth Amendment to the Constitution, which provides that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury.

Aside from the fact that an amendment of the indictment was actually made in the Bain case, there are other factors which distinguish it from the case at bar. The petitioner in that case had been indicted and tried in a federal court, and the writ of habeas corpus issued out of the Supreme Court of the United States. It was not a case where a single federal judge, of inferior jurisdiction, attempted to

interfere by habeas corpus, with the proceedings of either a state or territorial court having an entirely separate and distinct jurisdiction, nor was it a case where a single federal judge, of inferior authority, assumed jurisdiction as against the Supreme Court of a state or territory. Bain, himself, did not in any manner consent to the amendment either in person or by counsel. Nor did the Supreme Court of the United States pass upon or discuss the well settled rule that habeas corpus should not be granted by a federal judge in cases where a state or territorial court is acting, even if constitutional rights are being invaded, except under extraordinary and peculiar circumstances, but that a defendant should pursue his rights by means of a writ of error. Nor did this Court pass upon or discuss the matter of discretion in a federal judge to issue habeas corpus in cases where the matter had its origin in a state or territorial jurisdiction.

Notwithstanding the far reaching decision in the Bain case, this Court has on other occasions distinctly modified the rule there laid down. In the case of *Harlan vs. M. Gourin,* 218 U. S. 442, 441, this Court said:

"It is contended that competent testimony was adduced to show that the indictments were not properly presented by the grand jury in that the one under which the accused was tried was not legally found by the grand jury nor voted upon by them. Testimony was introduced to the effect that, after the presentation of the original indictment, the grand jury was informed by the District Attorney that the indictment needed amendment in some particular, this amendment was read over in the presence of the grand jury, was incorporated into an indictment, the indictment was legally returned into court, where it was produced with the consent of all the grand jurors. No objection was taken at the trial to the indictment for this reason, and upon proper pleas a trial and conviction were had; *certainly, an objection of that kind, if ever available, can not be made for the first time in a habeas corpus proceeding.*

The attitude of the Supreme Court of Hawaii when the matter was before it on bill of exceptions, and the decision it arrived at in that proceeding was not that the trial court had amended the indictment, but that the stipulation in question amounted to nothing more than a construction of the language of the indictment consistent with the rules of construction found in the laws of Hawaii. The occasion to apply the terms of the stipulation never arose before the trial court because the question was never raised there. But if it had been, any ruling upon it would have merely resulted in a construction of the indictment and stipulation by the court. The construction of indictments is one of the duties of a court, and in construing an indictment, a court no more acts without jurisdiction than if it were called upon to consider any other instrument presented to it in a case where the court had jurisdiction of the subject matter of the proceeding and of the parties to it. This case is not even one where the indictment was void in the first instance and an attempt made to make it good by stipulation. The indictment as found was not void, and the stipulation merely purported to construe it in the same manner that the territorial courts would have if called upon.

II

THE APPELLANTS COULD, AND DID, WAIVE ALL OBJECTIONS, IF ANY, TO THE INDICTMENT.

The stipulation, instead of attempting to amend the indictment, treated it at the most as containing formal defects that could be waived, and the defendants expressly waived those supposed defects. The waiver was inconsistent with any intent to amend. That there could be a waiver by the defendants under the circumstances is well settled.

Dunbar v. United States, 156 U. S. 185.
Kaizo v. Henry, 211 U. S. 146.

III

WHETHER THE INDICTMENT STATED AN OFFENSE AND WHETHER IT HAD BEEN IN FACT AMENDED WERE QUESTIONS WITHIN THE JURISDICTION OF THE TERRITORIAL COURTS OF HAWAII TO DETERMINE, AND THE DECISIONS OF THOSE COURTS ARE CONTROLLING.

Under the act of Congress of April 30, 1900, to provide a government for the Territory of Hawaii, commonly known as the Organic Act, the federal judicial system is kept entirely separate and distinct from the territorial, and the situation in that regard is almost precisely the same as exists in the states.

Section 6 of the Organic Act of Hawaii provides that the laws of the Territory not inconsistent with the Constitution and laws of the United States, or of the provisions of the act, shall continue in force subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States. Section 86 of the Organic Act, the proviso to which was added by amendment on March 3, 1905, is as follows:

"The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings, as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . . PROVIDED, That writs of error and appeal may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

It was held in the case of *Hornbuckle v. Toombs*, 18 Wall. 648, that the practice, pleadings and forms and modes

of proceedings of the territorial courts, as well as their respective jurisdictions, subject to the conditions of the Organic Act of the territory, were intended to be left to the legislative action of the territorial assemblies and to the regulations that might be adopted by the courts themselves. The court in that case said:

"The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively co-extensive with and correspondent to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction."

As a result of the status of territorial courts, it follows that when those courts are called upon either to construe a statute, an indictment, or a pleading in a case, their decisions stand upon the same footing as the decisions of state courts, and are entitled to the same consideration at the hands of the federal courts. As a consequence, if a territorial court has jurisdiction of the subject matter of the proceeding and of the person, all rulings made by such court during the course of a judicial hearing, particularly rulings construing or interpreting statutes, indictments or pleadings, are made in the exercise of the jurisdiction of the court, and are controlled by the local statutory procedure.

Fitzpatrick v. United States, 178 U. S. 304.
Summers v. United States, 231 U. S. 92.

The rule is well settled that in the consideration of the Constitution and laws of a state, the federal courts generally will follow the construction given by the highest court of the state. *Wilson v. North Carolina*, 169 U. S. 586. In *United States v. John Ii, Estate*, 3 United States

District Court of Hawaii, 575, the court, bearing in mind the analogy between state and territorial courts, held that the federal court of Hawaii would follow the construction of the laws of that territory made by its highest court.

The Supreme Court of the Territory of Hawaii, when the present controversy was before it on bill of exceptions, was called upon to construe and interpret not only the indictment as found by the grand jury, but the stipulation of January 27, 1922, and it held, without equivocation, not only that the indictment found by the grand jury charged an offense, but that the stipulation could not be construed as amounting to an amendment of the indictment. As we have already shown, these constructions of the Supreme Court of Hawaii are not only well founded, but they are constructions reached by a court of Hawaii concerning a matter clearly within its jurisdiction and for these reasons the construction and interpretation of the Hawaiian territorial court should be given by this Court the same recognition and effect as would be given to the construction and interpretation by a state court in a similar matter. That the matter is one of construction merely clearly appears from the case of *United States v. Fisk*, 3 Wall. 445, in which this court held that in the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature, and in order to do this the courts are often compelled to construe the word "or" as meaning "and," and, again, the word "and" as meaning "or." Whether the interpretation or construction concerns a statute, an indictment or a pleading is, of course, immaterial, as the principle involved is precisely the same.

The matter was one pertaining to the local practice and procedure of the territorial courts of Hawaii under

its statutes and the decisions reached by those courts are such as the federal courts will feel bound by and will follow.

John Ii Estate v. Brown, 235 U. S. 342.
Clason v. Matko, 223 U. S. 646.
Kalanianaole v. Smithies, 226 U. S. 462.
Hapai v. Brown, 239 U. S. 502.

The effect to be given to the admissions of counsel in a criminal case is a question of law to be determined by the local tribunals, and does not raise a question of jurisdiction.

Valentina v. Mercer, 201 U. S. 131.

There is therefore no federal question in the case.

IV

WHERE A COURT HAS JURISDICTION OF THE SUBJECT MATTER AND OF THE PERSON HABEAS CORPUS WILL NOT LIE.

It is a general rule, very firmly established, that the writ of habeas corpus can not be used to review error in cases where a court has jurisdiction of the subject matter and of the person. There are a number of cases that clearly point out under what circumstances this rule is applicable, and which define very clearly the term "jurisdiction."

In *Ex parte Watkins* 3 Pet. 193, 203, this court, speaking through Chief Justice Marshall, said that the Circuit Court of the District of Columbia, being a court of record, having general criminal jurisdiction, had power to decide conclusively whether an offense charged in an indictment was legally punishable or not, and that this constitutes exercise of jurisdiction precluding a review of the judgment on habeas corpus. Again in *Ex parte Coy*, 127 U. S. 731, this Court in affirming the judgment of a United States District Court denying habeas corpus, held that

the writ in case of a person held a prisoner by sentence of court, can only release the prisoner when it is shown that the court had no jurisdiction to try and punish him for the offense, and that the inquiry in such a case is not whether there is in the indictment such specific allegations of details of the charge as would make it good on demurrer, but whether the indictment describes a class of offenses of which the court has jurisdiction and alleges the defendant to be guilty.

One of the leading cases on the subject is *In re Yarbrough*, 110 U. S. 651. In this case an original petition for habeas corpus was filed in this court based upon a conviction had in a United States District Court, and it was held that if a court has jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further. In that case, the court held that whether the indictment sets forth in comprehensive terms the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the court in which the case originates, and is, therefore, clearly within its jurisdiction. And the court further held that the decision of the lower court on the conformity of the indictment to the provisions of the statute, even though it were erroneous, is an error of law made by a court acting within its jurisdiction which could be corrected on writ of error, if such writ were allowed, but which can not be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of that court.

The Yarbrough case is one of those cited in the appellants' brief in support of their contention.

In *Ex parte Parks*, 93 U. S. 18, the petitioner for habeas corpus claimed that his conviction was illegal because the

act for which he was convicted in a District Court of the United States, was not a crime against the laws of the United States, but this court said:

"Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings, on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. *The court may err but it has jurisdiction of the question. If it errs there is no remedy after final judgment unless a writ of error lies to some superior court, and no such writ lies in this case.* It would be an assumption of authority for this court, by means of the writ of habeas corpus, to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment."

See also: *State vs. Eno*, 155 U. S. 89.
Bergeman vs. Backer, 157 U. S. 655.

The situation in which the petitioner for habeas corpus found himself in the case of *Ex parte Frederich*, 149 U. S. 70, was similar in principle to the situation in the case at bar. Frederich was tried in a state court for murder and was convicted by the jury of murder in the first degree. Upon appeal the state supreme court reversed the judgment and remanded the case, with direction to vacate and set aside the judgment imposing the sentence of death by hanging, but to let the verdict stand and to enter a new judgment thereon for murder in the second degree, that being in the opinion of the state surpreme court the proper degree of his crime. This was done and Frederich then sued for a writ of habeas corpus in a circuit court of the United States. His application was denied and he then appealed to this court where the order of the circuit court was affirmed. It will be noted in this case that the supreme court of the state did not remand the case to the

lower court for a new trial, but took upon itself the function of rendering in effect a verdict different from that rendered by the jury that heard the cause. In other words, the judgment entered in the case was not based upon the verdict of a jury at all. But this court said:

"The court below practically agreed with the petitioner that the supreme court of the state had misinterpreted said section 1429 of the Code, and that what it had actually done by its decision and judgment was to modify the verdict of the jury, which under legal and proper proceedings, it has no authority to do; *that its judgment and the subsequent judgment of the trial court carrying it into effect were both void;* and that, therefore, the petitioner's imprisonment was without due process of law and in violation of the Fourteenth Amendment to the Federal Constitution. The circuit court further ruled, however, that the petitioner's proper remedy was not by writ of habeas corpus in the federal court in the first instance, but that he should first raise the question of his illegal imprisonment in the state courts, and if it was finally decided against him by the state supreme court, he could then have it reviewed and corrected by the Supreme Court of the United States on a writ of error, and it accordingly denied the application. 51 Fed. Rep. 747."

"While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not issue as a matter of course, and it should be cautiously used in the federal courts in reference to state prisoners . . . The writ of habeas corpus is not a proceeding for the correction of errors. (Citing many cases.)

"In some instances as *In re Medley*, 134 U. S. 160, the proceeding by habeas corpus has been maintained although a writ of error could be prosecuted; *but the general rule and the better practice in the absence of special*

facts and circumstances is to require a prisoner who claims that the judgment of a state court violates his rights under the Constitution or laws of the United States, to seek a review thereof by writ of error instead of resorting to the writ of habeas corpus."

The Frederich case is also cited by the appellants in their brief.

The First Judicial Circuit Court of the Territory of Hawaii, in which the case at bar was tried, is a court of record having general criminal jurisdiction, and in the exercise of that jurisdiction proceeded to try the petitioners in this case. The Supreme Court of the Territory of Hawaii, in the exercise of its appellate jurisdiction, and without in any manner exceeding its powers, was called upon to and did pass upon the sufficiency of the indictment and the legal effect of the stipulation referred to. The case was not at all different from those that we have referred to above where the holding has been that where a court acts in the exercise of its jurisdiction, in a matter in which it has jurisdiction, not only of the offense but of the person, its judgment, will not be interfered with by habeas corpus.

V

IN THE APPLICATION OF THE RULES GOVERNING HABEAS CORPUS THE TERRITORY OF HAWAII STANDS ON THE SAME FOOTING AS A STATE, AND EVEN VOID JUDGMENTS OF THE TERRITORIAL COURTS IN THE ABSENCE OF UNUSUAL CIRCUMSTANCES SHOULD NOT BE REVIEWED BY FEDERAL HABEAS CORPUS.

We have already shown that the territorial courts of Hawaii in their functioning stand on the same footing to all intents and purposes as the courts of a state. The question further arises as to whether the territory should be considered to be on the same footing as a state in

regard to the use of the writ of habeas corpus in the federal courts.

In the case of *Soga, et al v. Jarrett*, 3 United States District Court of Hawaii, 502, a verdict had been rendered in the territorial court in a conspiracy case by eleven jurors only. On habeas corpus in the United States District Court, it was held that the relation between the Hawaiian territorial courts and the federal court, was substantially the same as that existing between the state courts and the federal circuit and district courts within the same territorial limits, *that the federal District Court of Hawaii ought not to exercise its jurisdiction in habeas corpus where the petitioner is in custody under a void judgment of the territorial courts except in exceptional or peculiarly urgent cases*, and the mere fact that the petitioner was deprived of his liberty in violation of his rights under the federal constitution, did not necessarily make out an exceptional case or one of peculiar urgency. The Soga case cited the case of *In re Marshall*, Estee's Reports (District Court of Hawaii) 34, in which the petitioner was found guilty in the territorial court by nine jurors out of a jury of twelve, and was not indicted by a grand jury, and the case of *In re Mankichi*, Estee's Reports, 303, where the situation was substantially the same as in the Marshall case.

See also *Re Atcherley*, 3 United States District Court of Hawaii, 406.

The Circuit Court of Appeals of the Ninth Circuit, in the case of *Wilder's Steamship Company v. Hind et al*, (C. C. A.) 108 Fed. 113, said:

"Upon consideration of the various provisions of the act providing a government for the Territory of Hawaii, we are convinced that Congress intended thereby to establish in that Territory between the federal courts created by the act and the system of territorial courts then

existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states. . . .

"The system of courts created by the act for the territory of Hawaii differs radically from the system of courts which Congress had theretofore created for any of the territories. In no other territory has there been a division of jurisdiction between cases which properly belong to courts of the United States and other cases. Congress found in the Republic of Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system, Congress by the act added a district court, conferring upon it the jurisdiction which pertains to the district and circuit courts of the United States and provided for removing to that court from the territorial courts causes which under the removal acts were removable from a state court to a court of the United States."

And this court in *Ward McAllister, Jr., v. United States*, 141 U. S. 174, held that it must be regarded as settled that courts in the territories created under the plenary municipal authority that Congress possesses over the territories of the United States, are not courts of the United States.

See also: *American Insurance Co. v. 356 Bales of Cotton*, 1 Pet. 511;
Benner v. Porter, 9 How. 235;
Clinton v. Englebrecht, 13 Wall. 434;
Good v. Martin, 95 U. S. 90;
Hornbuckle v. Toombs, 18 Wall. 648;
Cornella v. Haskell, 158 Fed. 285.

In *Ex parte Wilder's Steamship Company*, 183 U. S. 545, this court held that under the Act of April 30, 1900,

organizing the Territory of Hawaii, the courts of that territory are governed as to appeals, writs of error, removal of causes, and other matters and proceedings between the courts of the United States and the courts of the Territory, in the same manner as between the courts of the United States and the courts of the several states.

VI.

THE CASE BEFORE THE COURT IS NOT ONE OF THOSE EXCEPTIONAL ONES THAT SOMETIMES WARRANTS THE INTERFERENCE BY FEDERAL COURTS WITH THE JUDGMENTS OF STATE OR TERRITORIAL COURTS.

It being beyond question that the territorial courts of Hawaii are on the same footing so far as their procedure and their relation to the federal courts are concerned as are the courts of the several states, the question arises as to what exceptional or unusual cases would warrant interference by habeas corpus by the federal courts with the judgments of the territorial courts of Hawaii.

This court in the case of *Minnesota v. Brundage*, 180 U. S. 499, gives a number of illustrations of exceptional and peculiar cases that may be considered exceptions to the general rule. One of these is *Loney's Case*, 134 U. S. 372, 375, in which the petitioner was held in custody by state authorities under a charge of perjury in deposing before a notary public in Richmond, Virginia, in a case of contested election of a member of the House of Representatives of the United States. The peculiar feature in this case was that the state courts were attempting to interfere in a purely federal matter, namely a contest pending in the House of Representatives of the United States.

Another illustration referred to in the Brundage case is found in *Ohio vs. Thomas*, 173 U. S. 276, 284, where the acting governor of the Central Branch of the National Home for Disabled Soldiers at Dayton, Ohio, was arrested for violating a law of the state. He was discharged on habeas corpus by a federal court because the state court had no jurisdiction, and because being a federal officer, he might be imprisoned on conviction and the operations of the federal government might thus be obstructed.

Another case in which there were peculiar circumstances is that of *Boske vs. Comingore*, 177 U. S. 459, 466, where the petitioner for habeas corpus was an officer of the Revenue Service in the United States, whose presence at his post of duty was important to the public interests and whose detention in prison by the state authorities might have interfered with the regular and ordinary course of the business of the department to which he belonged.

See also: *Urquhart vs. Brown*, 205 U. S. 179;
Re Chapman, 156 U. S. 211;
Riggins vs. United States, 199 U. S. 547.

The case of *Minnesota vs. Brundage*, 180 U. S. 499, is cited in the appellants' brief. The case of *Cunningham vs. Neagle*, 135 U. S., 1, is also cited there, but this was also an exceptional case involving the imprisonment of a federal officer who had shot and killed a man in protecting the life of a United States judge. *Frank vs. Mangum*, 237 U. S. 309, relied on by the appellants, was also a peculiar and exceptional case, and raised a very novel question. The claim was made in the Frank case that he was deprived of his constitutional right of due process of law because the mob influence was so great at the trial as to defeat the jurisdiction of the court. But in this case the court affirmed the decree of the United States District Court, denying habeas corpus, and held that habeas corpus can not be employed as a substitute for a writ of error.

Another of appellants' cases is *Thompson vs. Utah*, 170 U. S. 343, where the defendant was tried by a jury of eight as provided in the state constitution for an offense committed when Utah was a territory. The case, however, came before this court on a writ of error to the Supreme Court of Utah.

In *Ex parte Medley*, 134 U. S. 160, another case relied on by the appellants, the petitioner had been convicted under a state statute which was void as to him because ex post facto. No question in this case was raised as to whether the case should have been reviewed by this court through the orderly and regular course of writ of error.

In many of the cases relied upon by the appellants, the question as to whether the remedy by writ of error, instead of habeas corpus, should have been prusued, was not raised.

In commenting upon the case of *Minnesota vs. Barber*, 136 U. S. 313, one of the cases relied upon by the appellants, this court in *Minnesota vs. Brundage*, 180 U. S. 499, said that it must be admitted that in the Barber case the general rule announced in prior and subsequent cases was not applied, and although the reasons for not then applying it did not appear from the opinion of the court, it might have been that the precise point under examination was not called to its attention.

In *Markuson vs. Boucher*, 175 U. S. 184, the court said:

"We have frequently pronounced against the review by habeas corpus of the judgments of the state courts in criminal cases, *because some right under the Constitution of the United States was alleged to have been denied the person convicted*, and have repeatedly decided the proper remedy was by writ of error . . . .

"The jurisdiction is more delicate, the reason against its exercise is stronger when a single judge is invoked to reverse the decision of the highest court of a state in

which the constitutional rights of a person could have been claimed, and may be were rightly decided, and if not rightly decided, could be reviewed and redressed by a writ of error from this Court."

See also: *Baker vs. Grice*, 169 U. S. 284.

In the case at bar, there were no such extradorinary circumstances as would warrant a departure from the general rule that habeas corpus will not lie to review the decisions and judgments of state and territorial courts.

VII

UNDER THE LAWS OF HAWAII THE REMEDY WAS OPEN TO THE PETITIONERS TO AVAIL THEMSELVES OF THE JURISDICTION OF THE FEDERAL COURTS THROUGH THE ORDINARY AND CUSTOMARY METHOD OF WRIT OF ERROR, AND HABEAS CORPUS DOES NOT LIE MERELY BECAUSE THEY NEGLECTED TO AVAIL THEMSELVES OF THAT REMEDY.

On page 19 of their brief, the appellants claim that they had no right to an appeal or writ of error from the action of the Supreme Court of the Territory of Hawaii. While this statement is not untrue, it does not tell the whole story. The fact is that under the laws of Hawaii, there exists appropriate machinery by which the Supreme Court of the Territory could by writ of error have reviewed the judgment of the trial court, and have rendered a final judgment in the case which would have been subjct to review by the federal courts in the same manner that the judgments of the state courts in criminal courts are reviewed. The appellants, however, failed to avail themselves of the remedy provided by the laws of Hawaii under which a final judgment might have been secured in the Supreme Court of the Territory.

Section 2518 of the Revised Laws of Hawaii, 1915, provides as follows:

"A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge or magistrate, or by the decision of any court, except the Supreme Court, or by the verdict of the jury, at any time before execution thereon is fully satisfied, within six months from the rendition of the judgment."

Section 2534 of the same laws provides as follows:

"The Supreme Court shall have power to enter such judgment in the case as in their opinion the facts and law warrant."

Instead of attempting to get a review by the Supreme Court of the Territory of the judgment of the trial court by writ of error the appellants removed the case to the Supreme Court on bill of exceptions under the provisions of Sections 2513 to 2517 of the Revised Laws of Hawaii, 1915, and by their own voluntary act pursued a method of review that left them without a final judgment in the territorial Supreme Court.

The distinction between bills of exception and writs of error in Hawaii is pointed out in the case of *Cotton v. Hawaii*, 211 U. S. 162, in which the court said:

"It is clear under these statutes," (Statutes of Hawaii governing writs of error, appeals and exceptions), "the Supreme Court may review the action of the trial courts by two separate forms of procedure, either by writ of error or appeal, which brings up the judgment or decree with the entire record, and the other by exceptions, which does not bring up the whole record and calls upon the reviewing court merely to pass upon specific questions raised by the bill. The statutes, it will be observed, confer no express power upon the Supreme Court of the territory to enter a final judgment in a case upon the overruling of exceptions, and, indeed, that the Supreme Court of the territory does not construe the territorial statutes as giving it such authority, and, therefore, that

the court could not have intended to exert such power in this case so conclusively appears from the recent decisions of the Supreme Court of Hawaii as to leave the question not open to controversy."

It was, therefore, held in the Cotton case on writ of error from this court to the Supreme Court of Hawaii, that the Supreme Court of the United States had no jurisdiction because there was no final judgment in the Supreme Court of Hawaii upon which to base a writ of error.

To the same effect is the case of *Hutchins v. Bierce*, 211 U. S. 429.

In *Spreckels v. Brown*, 212 U. S. 208, it was held that while when a bill of exceptions alone is taken from the trial court to the Supreme Court of Hawaii, no writ of error will lie from the Supreme Court of the United States, yet when a party goes to the Supreme Court of Hawaii by writ of error from that court, a further writ of error will lie from the Supreme Court of the United States to review the final judgment of the territorial Supreme Court.

The present case is somewhat similar to that of the recent case of *Craig v. Hecht*, decided by this court on November 19, 1923. Craig who was Comptroller of New York City, was convicted of contempt of court by a district court of the United States for criticising by letter the action of that court in receivership proceedings. Another district court judge released Craig on habeas corpus upon the ground that the first judge *exceeded his jurisdiction* by an excess of power in adjudging Craig guilty. The Circuit Court of Appeals reversed the order discharging Craig on habeas corpus, and this court in sustaining the Circuit Court of Appeals said that on the merits there was nothing unusual about the case

and it could not be regarded as an exception to the general rules of procedure, nor did it present circumstances sufficiently extraordinary to bring it within any class of exceptional cases. It was also held that when Craig found himself aggrieved by the decree in the contempt proceedings, his remedy by appeal was plain, but he had neglected that course and asked a single judge to review and upset the entire proceedings; and then claimed that there was no appeal from the favorable order. The Chief Justice, in a concurring opinion in the case said:

"The petitioner and his counsel have made such a review impossible." (A review by the Circuit Court of Appeals from the judgment of contempt.) "Instead of pursuing this plain remedy for injustice that may have been done by the trial judge and securing by an appellate court a review of this very serious question on the merits, they sought by applying to a single judge of only coordinate authority for a writ of habeas corpus to release the petitioner, on the ground that the trial judge was without jurisdiction to make the decision he did. This raised the sole issue whether the trial judge had authority to decide the question—not whether he rightly decided it.

"*In this way the petitioner and his counsel threw away opportunity for a review of the case on its merits in the Circuit Court of Appeals and in this court* in their purpose to make a short cut and secure final release through the act of a single judge. *This is the situation the petitioner finds himself in and we are without power to relieve him.*"

In the case of *In re Chapman*, 156 U. S. 211, relied upon by the appellants, it is not held that a party may sit idly by and allow his rights to expire by lapse of time and then claim exceptional circumstances. That case holds that if judgment goes against a petitioner and is affirmed by the court of appeals, *and error lies*, that is the proper

and better remedy for any cause of complaint he may have. *If*, on the other hand, a writ of *error does not lie*, to the Supreme Court of the United States, *and the Supreme Court of the District of Columbia was absolutely without jurisdiction*, the petitioner may then seek his remedy through application for habeas corpus.

The petitioner for habeas corpus in *Markuson v. Boucher*, 175 U. S. 184, alleged among other things that he was without means or power to prosecute a writ of error, but it was held that the case presented no circumstances to justify a departure from the rule or to relieve from the application of its reasons.

The proposition that a party who by law is given a plain remedy by writ of error to review a judgment may, by neglecting to avail himself of the remedy thereby create a situation enabling him to invoke the extraordinary writ of habeas corpus to collaterally attack the judgment, is a novel one. The recognition of such a theory would so enlarge the availability of habeas corpus as to make it a substitute for writ of error at the option of the aggrieved party.

The failure then of a party to pursue a remedy plainly open to him should not be considered one of those exceptional or peculiar cases that would warrant the issuance of the writ of habeas corpus to review the judgment of a state or territorial court.

But another remedy has at all times been open to the appellants in the territorial Supreme Court, under which a review in the regular and orderly way could be had in the federal courts. Under sections 2252 and 2720 of the Revised Laws of Hawaii, 1915, the Supreme Court of Hawaii has original jurisdiction in habeas corpus. (See *Pepke v. Cronan*, 155 U. S. 100.) It might be said of course that the territorial supreme court would

follow its previous rulings, but the fact remains that it would have to enter a final judgment in the matter that would be subject to review by the federal courts on appeal or error. This case differs widely from that of *Stevens v. M'Claughry*, 207 Fed. 18 (Appellent's brief, pp. 22, 23), where the petitioner in habeas corpus was being detained under a void judgment of a federal court, and had lost his right to a review by lapse of time. The petitioner in that case, did not, as in the present case, go into an entirely foreign jurisdiction in order to secure relief.

VIII.

IF ANY DISCRETION EXISTED TO ISSUE A HABEAS CORPUS IN THIS CASE IT WAS PROPERLY EXERCISED UNDER THE CIRCUMSTANCES.

The appellee does not concede that a federal court has unlimited discretion in the matter of issuing a writ of habeas corpus even in a criminal case where a state or territorial court has no jurisdiction. The discretion that may be exercised by a federal court under such circumstances is limited, and as we have shown should only be exercised where unusual and peculiar circumstances exist, such as the detention of an officer of the United States to the detriment of the public interests, or the detention, perhaps, of a foreign diplomatic officer, or where there are some circumstances beyond the control of the petitioner for the writ that places the case within the unusual category.

In *Ex parte Royall*, 117 U. S. 241, 253, it was said:

"Where a person is in custody under process from a state court of original jurisdiction, for an offense against the law of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him upon habeas corpus in advance of his trial

in the court in which he was indicted; that discretion to be subordinated to any special circumstances requiring immediate action. *When the state court shall have finally acted upon the case, the circuit court has still a discretion,* whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States."

The facts in the case now before the court, which are fully set out in the opinion of the Supreme Court of Hawaii (27 Hawaiian Reports, 65), would make any court hesitate long before exercising a discretion favorable to the petitioners in this case. The case, itself, is an ordinary one of conspiracy, entered into between the leaders of a number of Japanese labor unions, during the pendency of a strike, and shows a cold-blooded premeditated attempt to personally injure, if not to kill, a somewhat prominent Japanese and to destroy his property. The trial and other proceedings in the territorial courts so far as appears, were conducted with the utmost fairness. It does not appear that any grave injustice has been done any of the petitioners. They were amply and ably represented at all stages of the proceedings by counsel. There is nothing in the case to appeal to the sentimental side of this court, and the petitioners having followed a course of procedure which made it impossible for them to secure a review of the questions involved by the federal courts in the ordinary and usual way, should not be permitted to invoke the extraordinary writ of habeas corpus to relieve themselves from a position in which they voluntarily placed themselves.

The only unusual things in the case are that the petitioners, after carefully stipulating as to their understanding of the meaning of the indictment, after saynig it was not uncertain, after having waived its defects, if any, after having stated that they knew with what they were charged, and after having put the Territory of Hawaii to the expense of a trial, more than a year later, when the matter was in the Supreme Court of Hawaii on bill of exceptions claimed for the first time that the indictment had been amended and, therefore, the trial court had no jurisdiction, and now urge, as exceptional circumstances their own negligence. These are not such exceptional and peculiar circumstances as will warrant the federal courts in releasing the appellants by means of the writ of habeas corpus, but rather facts that call for disapproval and censure by the court.

It is earnestly contended that the judgment of the United States District Court for the District of Hawaii, denying the application of the appellants for a writ of habeas corpus, be sustained by this court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

I. GOTI, H. MIYAZAWA, K. TAKIZAWA, ET AL., Appellants, *v.* JOHN C. LANE, HIGH SHERIFF OF THE Territory of Hawaii.	No. 463.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

This case comes before the Court upon an appeal direct from the District Court of the United States for the District of Hawaii. It brings here for review a judgment of that court which denied a writ of habeas corpus to the Appellants, who were in prison under a judgment of the First Circuit Court of the Territory of Hawaii.

The Appellants, thirteen in number, presented their petition to the District Court averring that they were being unlawfully restrained of their liberty by the respondent, the High Sheriff of the Territory of Hawaii. In addition to the matters of fact alleged, the petition contained many conclusions of law. The

return filed by the Respondent admitted the averments of fact, but denied the conclusions of law. From the petition, the return, and the opinion of the Supreme Court of the Territory of Hawaii rendered by that court when the cause was before it upon a bill of exceptions (*Territory* v. *Goto*, 27 Haw. 65, which is printed in full as an appendix to this brief), the following facts appear.

On August 1, 1921, the appellants, along with others, were jointly indicted by a grand jury sitting in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, with the crime of conspiracy in the first degree. (Section 4084, Hawaiian Revised Laws of 1915.) The indictment was in two counts and contained a number of allegations in the alternative. (R. 6.) A plea of "Not Guilty" was entered September 13, 1921, and the case came on for trial January 31, 1922. (R. 3.) Four days prior to this, on January 27, a stipulation was signed by the prosecuting attorney, the defendants, and their counsel, in which the defendants and their counsel waived any and all exceptions or objections which they might have taken to the certainty or sufficiency of the indictment because of the disjunctive and alternative pleading. (R. 8.) This stipulation was approved by the trial judge and filed with the clerk. It is the pretext upon which the case comes here.

The petition avers that this stipulation "undertook to and did without a resubmission thereof to the Grand Jury, change and amend said pretended indictment by striking therefrom the word 'or' wherever

it occurs in said pretended indictment and inserting in lieu thereof the word 'and.'" And further that "your petitioners were * * * placed on trial, by jury, * * * on the charge made in said pretended indictment *as altered and amended by the stipulation*." (R. 3.) The return denies "(*a*) That the indictment returned against said defendants was invalid or insufficient in any respect"; and "(*b*) That the stipulation * * * was or is an amendment for [or] change of said indictment or that said indictment was in any way altered thereby." (R. 13.) As no traverse was filed to the return, the averments just quoted would have to be accepted as true, if they were averments of fact. It is clear, however, from the whole of the pleadings that they were not intended as such. Both the petitioners and the respondent admit the filing of the stipulation with the Clerk, but take issue as to its legal effect.

After a trial lasting more than a month a verdict of "Guilty" was returned on March 4, 1922, and on March 10, the defendants were sentenced to be imprisoned in Oahu Prison at hard labor for a term of not less than four years nor more than ten years. (R. 3.)

No writ of error from the Supreme Court of the territory was sought, but instead the defendants filed in that court a bill of exceptions, which included, among others, a general exception—"that said verdict, judgment, and sentence were contrary to the law and the evidence." (R. 3–4.) No specific exception to the sufficiency of the indictment was taken.

The situation before the appellate court may be best presented by the following extract from its opinion (see Appendix, post p. 37):

> The attorneys who represented the defendants throughout the trial have brought the case here upon exceptions, none of which go to the insufficiency of the indictment. At the oral argument on the exceptions before this court, one of the attorneys who conducted the trial on behalf of defendants and who had filed a brief herein in support of his bill of exceptions expressly stated that he considered himself bound by the stipulation entered into by him on behalf of defendants, that he did not propose to and would not now urge that the indictment against defendants was in any manner defective or insufficient, and that any attack that might now be made against the sufficiency of the indictment was entirely without his support or approval. Notwithstanding the stipulation and the attitude of the attorneys who had appeared for defendants throughout the trial, another attorney, appearing in this court for the first time as an attorney for defendants, has filed herein a supplemental brief in which the contention is made that the indictment is not sufficient to charge defendants with the commission of any crime, and that the verdict and judgment of guilty based on such indictment are contrary to the law for that reason. This attorney at the oral argument contended that the stipulation entered into between the other counsel for defendants and the prosecution

> was equivalent to an amendment of the indictment, and that no amendments to an indictment returned by a grand jury are permissible. He also argued that the attempted waiver is ineffectual. It is conceded by all of the authorities that amendments of an indictment returned by a grand jury may be made only by that body itself, and that no one else has the right to amend. Passing, without further comment, the very unusual situation of defendants, who, in one and the same breath and in the same proceeding, say through one attorney that they stand by their waiver and refuse to argue in derogation of the indictment and urge through another attorney that the indictment is bad, we are of the opinion that the stipulation in question can not be construed as amounting to an amendment of the indictment. The trial court did express its approval of the stipulation and of the waiver contained therein, but it did not amend the indictment or attempt or purport to do so.

The exceptions were not disposed of until April 26, 1923, when they were overruled; and on April 28 a mittimus was issued to the Sheriff by the court below. (R. 4.)

The petition further avers that there is no right of review of the order of the Supreme Court of the Territory overruling the exceptions and that the petitioners have no means of relief save by habeas corpus in the Federal courts. (R. 4.) This is denied in the return. (R. 14.)

On May 9, 1923, the petition for a writ of habeas corpus was filed in the United States District Court. The grounds for relief set out are:

1. That the original indictment, because of its uncertainty, "failed to inform petitioners of the nature and cause of the accusation against them and each of them, as guaranteed by the Sixth Amendment to the Constitution of the United States" (R. 4, pgh. 5 (*a*);) and

2. That the alleged amendment of the indictment, without its resubmission to the Grand Jury, destroyed it, and accordingly the petitioners are "held to answer for an infamous crime without the presentment or indictment of a grand jury, in violation of the Fifth Amendment"; are "being deprived of their liberty without due process of law in violation of the Fifth Amendment"; and are "being denied the equal protection of the law, as guaranteed by the Fourteenth Amendment." (R. 4, pgh. 5, (*b*), (*c*), (*d*).)

The District Court did not consider these constitutional questions, but declined to issue the writ upon the ground that the case was not one of such peculiar urgency as would justify it. (R. 16–20.) From that decision this appeal has been taken.

ARGUMENT.

I.

The Jurisdiction of the Federal Courts to Issue the Writ of Habeas Corpus.

To establish their right to the writ of habeas corpus denied by the District Court the appellants here must show—

1. That their case is one of peculiar urgency, and

2. That the court under whose process they are imprisoned was without jurisdiction.

Both of these essentials are wanting.

The authority of the Federal Courts to issue the writ of habeas corpus to discharge persons imprisoned is found in Section 753 of the Revised Statutes, which is as follows:

> The Writ of Habeas Corpus shall in no case extend to a prisoner in jail, unless—
>
> [1] where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof;
>
> [2] or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof;
>
> [3] or is in custody in violation of the Constitution, or of a law or treaty of the United States;
>
> [4] or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or

> order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations;
>
> [5] or unless it is necessary to bring the prisoner into court to testify.

The jurisdiction as outlined in this section is the result of a gradual growth and extension of Federal power due to peculiar exigencies which at different times have arisen in the administration of Federal laws. A brief review of this growth will indicate what is meant by the declarations of this Court in a number of cases wherein it has said that the writ will issue to discharge one imprisoned under process of a State court only in cases of *peculiar urgency*.

Under the original Judiciary Act (Sept. 24, 1789, c. 20, sec. 14, 1 Stat. 81) the authority of the Federal courts was very limited. That Act contained this proviso:

> *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

This provision permitted the issuance of a writ only in cases now provided for by the first and fifth divisions of Section 753 of the Revised Statutes, as we have printed it above. And it is under this authority that writs may be issued by one Federal court to discharge persons held in custody under the process of another. Most of the cases upon which

the appellants here rely have arisen in the exercise of this jurisdiction.

In 1833 a critical situation arose owing to the opposition of the South, particularly of South Carolina, to the tariff laws then effective. An ordinance of nullification had been drafted and was about to be passed by the Legislature of South Carolina, and forcible, as well as orderly, resistance to the enforcement of the revenue laws was imminent. For the protection of Federal revenue officers and to avoid interference by the several States, Congress extended the jurisdiction of the Federal courts to issue writs of habeas corpus so as to include (Act of March 2, 1833, c. 57, sec. 7, 4 Stat. 634):

> All cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof. * * *

A few years later an incident occurred in the State of New York which brought the country to the brink of war with England, and which resulted in a further extension of the jurisdiction of the Federal courts. Alexander McLeod, a subject of Great Britain, was said to have taken part in the burning of the steamboat *Caroline* by a band of Canadians while it was engaged in carrying ammunition and supplies to a company of insurgents against the Canadian Government, who were defending themselves upon an island

upon the Canadian side of the Niagara River. In the course of the destruction an American citizen was killed. McLeod was arrested and indicted for murder in the Supreme Court of the State of New York. Thereupon the British Foreign Office assumed responsibility for the acts of violence complained of, and demanded McLeod's return. A report of the Committee on Foreign Relations of the House, which severely criticized the language of the British Minister, inflamed the situation. This report was indorsed by a majority of the House, which was Democratic and opposed to the Administration then about to enter office. The Federal authorities were powerless to interfere, and Daniel Webster, then Secretary of State, suggested that McLeod apply for a writ of habeas corpus to the courts of New York. This was done, and the District Attorney of the United States, appearing as a private citizen, acted as attorney for the petitioner. In a lengthy opinion, *People* v. *McLeod*, 25 Wendell's Reports 481, Judge Cowen refused the writ and directed that the petitioner be tried. The British Government ordered the mobilization of part of its troops and ships and prepared for war. When the case came on for trial the State of New York was represented by its Attorney General and the accused was again represented by the District Attorney of the United States. Fortunately the serious consequences which threatened were averted by a verdict of acquittal. Congress, however, realized the urgent necessity of supplementing the power of the Federal courts, and

thereupon enacted the Act of August 29, 1842, c. 257, 5 Stat. 539, which authorized the writ—

> In all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done, or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

A further and final extension of Federal power was made by the Reconstruction Act of February 5, 1867, c. 28, 14 Stat. 385, which arose out of the unusual circumstances then existing and was intended to be exercised by the courts only in unusual and exceptional cases. It extended the jurisdiction to—

> All cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States.

These are the several component elements which were combined to make the jurisdiction of the Federal courts as outlined in Section 753 of the Revised Statutes.

There is no doubt that under the broad language of the Act of 1867 the several courts of the United States have jurisdiction upon writ of habeas corpus

to inquire into the cause of commitment of anyone restrained of his liberty under color or authority of the United States, or of any of the several States or Territories, and to ascertain whether he be held in violation of the Constitution or of any treaty or law of the United States. (*Ex parte Royall*, 117 U. S. 241, 245–250.) But it is equally clear that this power can not be exercised in every case to which it might be applicable without drawing into the Federal courts for determination upon habeas corpus a myriad of cases wherein the constitutional validity of statutes of the several States and Territories is challenged, or wherein the jurisdiction of the criminal courts of the several States is questioned. And the exercise of this power in all cases to which it may extend would create constant friction between the State and Federal courts and produce a confusion amounting almost to paralysis in the administration of the criminal law. In fact, during the years from 1868 to 1885, during which appellate jurisdiction over such cases was denied to this Court, the subordinate Federal courts, especially in the South, did abuse their power. (See Abuse of the Writ of Habeas Corpus—American Law Review (1884), New Series, Vol. 18, p. 1.)

When the appellate jurisdiction of this court was restored by the Act of March 3, 1885, c. 353, 23 Stat. 437, the court in *Ex parte Royall*, 117 U. S. 241 (March 1, 1886), laid down the rule which, with very few exceptions, has since been followed. Quoting from *Covell* v. *Heyman*, 111 U. S. 176, 182, it declared that:

The forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; *but between State courts and those of the United States it is something more. It is a principle of right and of law, and, therefore of necessity.* [Italics ours.]

Mr. Justice Harlan then continued (page 253):

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactment in question, this court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is

restrained of his liberty in violation of the Constitution of the United States.

In *Urquhart* v. *Brown*, 205 U. S. 179, 181, Mr. Justice Harlan, again speaking for the court, said:

> It is the settled doctrine of this court that although the circuit courts of the United States, and the several justices and judges thereof, have authority, under existing statutes to discharge, upon habeas corpus, one held in custody by State authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of Government, between the judicial tribunals of the Union and of the several States, a Federal court or a Federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under State authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the State for determining whether he is illegally restrained of his liberty. After the highest court of the State, competent under the State law to dispose of the matter, has finally acted, the case can be brought to this court for reexamination. *The exceptional cases in which a Federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the State are those of great urgency that require to be promptly disposed of, such, for instance, as cases "involving the authority and*

> *operations of the General Government, or the obligations of this country to, or its relations with, foreign nations."*
>
> * * * * *
>
> The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a State court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State and finally discharged therefrom. [Italics ours.]

The limitation thus placed by the rule of comity upon the exercise of this jurisdiction of the Federal courts has been repeatedly declared by this Court in other cases:

> *Ex parte Fonda*, 117 U. S. 516.
> *New York* v. *Eno*, 155 U. S. 89.
> *In re Wood*, 140 U. S. 278.
> *In re Frederich*, 149 U. S. 70.
> *Pepke* v. *Cronan*, 155 U. S. 100.
> *Whitten* v. *Tomlinson*, 160 U. S. 231.
> *Baker* v. *Grice*, 169 U. S. 284.
> *Tinsley* v. *Anderson*, 171 U. S. 101.
> *Markuson* v. *Boucher*, 175 U. S. 184.
> *Minnesota* v. *Brundage*, 180 U. S. 499.
> *In re Lincoln*, 202 U. S. 178.

It is clear from these numerous decisions that the discretion of Federal courts to issue the writ of habeas corpus to inquire into the cause of detention of persons imprisoned under the authority of a State is limited to cases of peculiar urgency. The sweeping power given

by the Act of 1867 is not to be used to effect a general jail delivery, but is to be reserved for exercise only in those unusual cases where the operations of the Federal Government or its relations with foreign nations are involved, or in other cases of similar character, which because of their exceptional circumstances are of great public interest and concern. We think the court below was clearly right in this conclusion. There have been a few cases in which this rule has been departed from, as, for example, in the case of *Medley, Petitioner*, 134 U. S. 160. But the action of the court in that case was subsequently criticized in *In re Frederich*, 149 U. S. 70.

In addition to the limitation thus imposed by comity is another which arises from the nature of the writ itself. It can not be used as a writ of error to correct erroneous rulings or decisions of another court, but only to discharge a petitioner where it appears that the court under whose authority he is confined acted without or in excess of its jurisdiction.

Ex parte Watkins, 3 Peters 192.
Ex parte Parks, 93 U. S. 18.
Ex parte Yarbrough, 110 U. S. 651.
Riggins v. *United States*, 199 U. S. 547.
Harlan v. *McGourin*, 218 U. S. 442.
Glasgow v. *Moyer*, 225 U. S. 420.
Craig v. *Hecht*, 82 October Term, 1923, decided Nov. 19, 1923.

We think it clear that the appellants in the instant case must show (1) that their case is one of peculiar urgency, and (2) that the court under whose process they are imprisoned, was without jurisdiction. Unless

both of these elements be present the order of the District Court denying the writ must be affirmed.

II.

The Rule Applicable to Persons Imprisoned Under the Process of State Courts Applies to those Imprisoned Under the Process of the Territorial Courts of Hawaii.

It is earnestly urged by counsel for the appellants that the Territorial Courts of Hawaii stand in the position of Federal courts, not in that of State courts; that the jurisdiction exercised in inquiring into the cause of restraint of one held under their process is that which was given to the Federal courts by the original Judiciary Act, not that given by the Act of 1867; and that the rule dictated by comity does not apply in the instant case.

Whether this view be correct with respect to the courts of other Territories it is not now necessary to inquire; but the courts of Hawaii have always been treated both by Congress and by the Federal courts as having status of State courts.

Hawaii was an independent self-governing Republic at the time of its annexation to the United States. It had its own system of courts administering its own code of laws. After the annexation these continued to function for two years before Congress passed an organic act for the Government of the Territory.

In the Matter of Marshall, 1 U. S. D. C. Haw. 35, 41, decided October 23, 1900, the United States District Court of Hawaii said:

> The conditions which existed on these Islands when annexed to the United States were unusual. This Territory had a civilization peculiar to itself, a government republican in form, with a written constitution, civil and penal statutes, courts of justice with established jurisdiction. It had public schools and other institutions of learning and laws enforcing compulsory education. It was not mere territory lying in mid-ocean unused, but ready for man's use. It was a free, enlightened State possessing all the attributes of sovereignty, and when, with its consent, the Islands were annexed by the United States, not only the lands, but the people with their laws and customs were annexed.
>
> * * * * *
>
> These Islands, although originally a monarchy, had become a republic and the people were somewhat versed in the principles of self-government. So much was this so that Congress waited nearly two years before enacting a law for the government of the Territory. In the meantime no laws were enforced in the Territory of Hawaii but the laws of the Republic of Hawaii. The strong arm of the Federal Government was not felt here. * * *

The Organic Act of April 30, 1900, c. 339, 31 Stat. 141, provided for the continuance of the existing courts of the Territory and for the creation of a Dis-

trict Court of the United States. In Section 86 it provided, *inter alia*, as follows:

> The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings *as between the courts of the United States and the courts of the several States* shall govern in such matters and proceedings *as between the courts of the United States and the courts of the Territory of Hawaii.* [Italics ours.] (31 Stat. 158.)

This provision has continued unchanged in the later Acts of March 3, 1909, c. 269, sec. 1, 35 Stat. 838, and July 9, 1921, c. 42, sec. 313, 42 Stat. 119.

In *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113, an appeal was taken from the Supreme Court of the Territory of Hawaii to the Circuit Court of Appeals for the Ninth Circuit in an admiralty case which had been pending in the Territorial Court when the Act of 1900 became effective. The appellant contended that an appeal lay to the Circuit Court of Appeals under Section 15 of the Act of March 3, 1891, which gave jurisdiction to that court in appeals and writs of error to the courts of the several Territories. It was held, however, that that provision was not applicable to the courts of the Territory of Hawaii, because the latter stood in the same relation to the Federal courts as did the courts of the several States.

The Circuit Court of Appeals in that case said, at page 114:

> Upon consideration of the various provisions of the Act providing government for the Territory of Hawaii, we are convinced that Con-

gress intended thereby to establish in that Territory between the Federal court created by the Act and the system of territorial courts then existing, and substantially by the Act perpetuated, the relation which exists between the courts of the United States and the State courts in the various States. * * * In Section 86 we have the clearly expressed purpose of Congress to provide that the laws of the United States relating to appeals, writs of error, removal of causes, and other proceedings, as between courts of the United States and the courts of the several States, shall govern in like matters and proceedings as between the Federal court and the Territorial courts of the Territory of Hawaii. * * * If Congress had established in the Territory of Hawaii a system of territorial courts only, an appeal from the decision of the highest court of the Territory would, of course, be reviewable in the United States Circuit Court of Appeals under the provisions of the Act creating the latter court. But in this instance Congress has created two systems of courts—one a District Court for the jurisdiction of Federal causes, the other for the trial of all other cases. It has provided specially for appeal to this court from the decisions of the District Court. It has made no such provision for appeal from the final decision of the Territorial Courts, but has enacted a general statute, the intention of which and the purport of which was to place the Supreme Court of the Territory upon the basis of the Supreme Courts of the States in all matters which concern their

> relation to the courts of the United States. The system of courts created by the Act for the Territory of Hawaii differs radically from the system of courts which Congress had theretofore created for any of the Territories. In no other Territory has there been a division of jurisdiction between cases which properly belong to the courts of the United States and other cases. Congress found in the Republic of Hawaii a system of courts already established, whose jurisdiction was complete, and from the highest tribunal of which there was no appeal. To that system Congress, by the Act, added a District Court, conferring upon it the jurisdiction which pertains to the District and Circuit Courts of the United States, and providing for removing to that court from the Territorial Courts causes which, under the removal acts, were removable from a State court to a court of the United States.

Subsequently a petition was presented to this court for a writ of mandamus to compel the Circuit Court of Appeals to take jurisdiction of this appeal. The case is reported as *Ex parte Wilder's Steamship Company*, 183 U. S. 545. In the statement of the case at page 547 will be found a brief review of the history of our relations with the Republic of Hawaii and of the organization of the Territory. The writ of mandamus was refused by this Court, thereby affirming in effect the prior decision of the Circuit Court of Appeals. In referring to Section 86 of the Organic

Act for the Territory of Hawaii, Mr. Justice Gray said, at page 551:

> And the remaining clause as to appeals, writs of error, removals of causes, and other matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii provides that they shall be governed, not by the laws applicable to other Territories, but by the laws of the United States as to such matters and proceedings, "as between the courts of the United States and the courts of the several States." Congress may have considered that, owing to the great distance of the Territory of Hawaii from the Continent, the appellate jurisdiction over that Territory should be more restricted than that over other Territories, and should extend only, as in the case of the several States, to judgments against a right claimed under the Constitution, laws, or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood.

See also *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 309.

Not only has Congress clearly and unequivocally declared its intention that the Territorial Courts of Hawaii shall have the status of State courts, but the United States District Court for the Territory of Hawaii has consistently treated them as such, as is evidenced by numerous decisions of that court.

Matter of Marshall, 1 U. S. D. C. Haw. 34.
Matter of Mankichi, 1 U. S. D. C. Haw. 303.

Matter of Atcherley, 3 U. S. D. C. Haw. 404.
Soga et al. v. *Jarrett*, 3 U. S. D. C. Haw. 502.
Matter of Curran, 4 U. S. D. C. Haw. 730.
In re Kim Ung Pil, — U. S. D. C. Haw. — (March 1, 1923).

In view of the declaration of Congress and of these decisions it is clear that in the exercise of its jurisdiction by habeas corpus the Federal Court in Hawaii should deal with the Territorial Courts in precisely the same manner as it would deal with the courts of a State of the Union.

III.

This Is Not a Case of Peculiar Urgency.

We have already observed that the Federal courts will issue a writ of habeas corpus to inquire into the cause of detention of one imprisoned under the process of the courts of a State or of the Territory of Hawaii only in cases of peculiar urgency; and that it appears from the history of the growth of the Federal jurisdiction and from the decisions of this court that cases of peculiar urgency are those which involve the administration of Federal laws or concern our foreign relations, and possibly those which because of unusual and exceptional circumstances are of great public interest and concern. In apparent recognition of this rule counsel for the appellants declare that (Brief, p. 21), "*Under the exceptional circumstances of this case* the United States District Court of Hawaii was authorized to grant and should have granted the relief sought by appellants through

habeas corpus." We have, however, searched the record and the brief without avail to discover what unusual or exceptional circumstances are presented by this case. The only suggestion we have found is the alleged absence of any other remedy for bringing the case here for review. (Brief for Appellants, pp. 18–21.)

Counsel rely upon *Stevens* v. *McClaughry*, 207 Fed. 18, quoting that part of the opinion wherein it was said that a petitioner "is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late." But that was a case in which the defendant was "in custody under or by color of the authority of the United States." It was an exercise of the jurisdiction vested in the courts by Section 14 of the original Judiciary Act (1 Stat. 81), not a case in which, under the decisions of this court, any matter of peculiar urgency need be shown. That decision is certainly not authority for the proposition which the appellants here urge—that when one imprisoned under process of a State court has "through ignorance or neglect" failed "to appeal or procure a writ of error within the prescribed time," he thereby acquires a right to the writ from a Federal court. If this be the law a defendant can create for himself a right to be heard upon habeas corpus in the Federal courts by the simple expedient of neglecting or refusing to avail himself of the right of review afforded by the appellate courts of the State. Or he can refuse to raise in the State courts the Federal or constitutional

question upon which he relies, and after they have finally disposed of his case he can then raise it for the first time upon his petition to the Federal courts for habeas corpus. *Stevens* v. *McClaughry*, *supra*, sanctions no such doctrine.

It is important to note, however, that if the appellants in the instant case be without a remedy it is a result of their own deliberate choice.

The appellate practice in the territorial courts of Hawaii came under the consideration of this court in *Colton* v. *Hawaii*, 211 U. S. 162, which came here upon a writ of error to the Supreme Court of Hawaii. A motion to dismiss was made upon the ground that a writ of error did not lie to review a decision of that court upon a bill of exceptions, such decision not being a final judgment. The sections of the Revised Laws of Hawaii for 1905, which then regulated appellate procedure (Sections 1862–1873), are printed in a footnote on pages 171–173 of the report in that case, and are in all material respects the same as those of the Revised Laws of Hawaii for 1915 (Sections 2511–2519 and 2522–2524) now in effect. Referring to them this Court said (p. 171):

> It is clear that under these statutes the Supreme Court may review the action of the trial courts by two separate forms of procedure, either by writ of error or appeal, which brings up the judgment or decree with the entire record, and the other by exceptions, which does not bring up the whole record and calls upon the reviewing court merely to pass upon specific questions raised by the bill.

> The statutes, it will be observed, confer no express power upon the Supreme Court of the Territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the Territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question not open to controversy.

The Supreme Court of Hawaii has frequently held that the remedies by writ of error and bill of exceptions are concurrent. (*Ferreira* v. *Rapid Transit Co.*, 16 Haw. 406, 408; *Cummings* v. *Iaukea*, 10 Haw. 1; *Notley* v. *Brown*, 17 Haw. 455, 457.)

It is clear, therefore, that when the trial court imposed sentence upon these appellants on March 10, 1922, there were open to them two modes of review by the Supreme Court of the Territory. Had they chosen to sue out a writ of error they could, in the event of an unfavorable decision, have obtained a writ of error from this court. They elected, however, to go to the appellate court upon a bill of exceptions, from the decision upon which no writ of error from this court lay. (*Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429; *Spreckels* v. *Brown*, 212 U. S. 208.) It was not a case of enforced delay, of inadvertence, of want of able counsel, nor of neglect, but one of deliberate choice. Absence of a remedy under such circumstances does not entitle

them to relief by the extraordinary process of habeas corpus in the Federal courts.

That an absence of other remedy as a result of the deliberate choice of the petitioner will not entitle him to a writ of habeas corpus from a Federal court is strongly suggested by the cases of *Baker* v. *Grice*, 169 U. S. 284, and *Craig* v. *Hecht*, No. 82, October Term, 1923, decided November 19, 1923. In the former case the court used language quite appropriate to the case at bar (p. 294):

> This whole case is clearly nothing but an attempt to obtain the interference of a court of the United States when no extraordinary or peculiar circumstances exist in favor of such interference.

But there is another consideration. Another remedy in the Territorial Courts did exist after the decision of the Supreme Court of Hawaii upon the appellant's bill of exceptions and that remedy is open and available to them to-day. The appellants may apply to the Supreme Court of Hawaii for a writ of habeas corpus.

Sections 2718–2720 of the Revised Laws of Hawaii for 1915 provide as follows:

> SEC. 2718. *Writ of right.*—Every person restrained of his liberty, except in the cases mentioned in the following section, may prosecute, as of right, a writ of habeas corpus, according to the provisions of this chapter, to obtain relief from such restraint, if unlawful.

SEC. 2719. *Except in certain cases.*—The following persons shall not be entitled, as of right, to demand and prosecute the said writ:

First. Persons committed for felony, or for suspicion thereof, or as accessories before the fact, to a felony, when the cause is plainly and specially expressed in the warrant of commitment, unless when excessive and unreasonable bail is required.

Second. Persons convicted, or in execution upon legal process, civil or criminal.

Third. Persons committed on mesne process, in any civil action, on which they are liable to be arrested and imprisoned, unless when excessive and unreasonable bail is required.

SEC. 2720. *Issuable when not of right.*—The supreme court, the justices thereof, and the circuit judges may in their discretion issue writs of habeas corpus in cases in which such writs are not demandable of right as well as in cases in which they are demandable of right.

When their bill of exceptions was overruled by the Supreme Court of Hawaii on April 26, 1923, more than six months after the judgment of the trial court had been entered, and too late for them to sue out a writ of error (see appellants' brief, pp. 19–21), they could and should have applied to the Supreme Court of the Territory for a writ of habeas corpus. If they had done so and that court had found the judgment of the trial court void, they would have been discharged. If, on the other hand, that court, adhering to the views expressed in its opinion upon the bill of exceptions, had refused or dismissed the writ, the ap-

pellants could have come to this court upon appeal as a matter of right, without showing any unusual or exceptional circumstances. To this the Appellants will answer that it would be useless to ask the Supreme Court to consider again the same question which it considered so fully upon a prior occasion. No doubt the court would have reached the same conclusion, but that is beside the point—which is the propriety of the procedure followed. That which we suggest is regular, orderly, and ordinary, while the one adopted is unusual and extraordinary; the former affords an unquestioned right of review by this Court, while the latter requires a showing to the District Court of peculiar urgency; the former provides for a review of the decision of the Supreme Court of Hawaii by a court of nine Justices with admittedly superior jurisdiction, while the latter provides a review by a single judge exercising original jurisdiction and commissioned to administer a separate system of law within the same territorial limits.

That the remedy by habeas corpus in the Supreme Court of Hawaii was and is the proper course for the Appellants to pursue is evident from the cases of *Soga et al.* v. *Jarrett*, 3 U. S. D. C. Haw. 502, and *Kaizo* v. *Henry*, 211 U. S. 146. In the former, which was almost identical with the instant case, the court said (page 516):

> The ordinary and proper course for the petitioners to pursue would be that taken by the petitioner in the case of *Kaizo* v. *Henry*, 211 U. S. 146—that is, to apply to the Su-

preme Court of the Territory for a writ of habeas corpus—and if they should be able to show that the Circuit Court under whose judgment they are held was without jurisdiction for any of the reasons alleged, it would be the duty of the Supreme Court to grant the writ and order the discharge of the petitioners, and if that court should fail to do its duty, upon any mistaken ground, the error would be rectified by the appropriate tribunal, namely, the Supreme Court of the United States. (See the case of *Nielsen, Petitioner*, 131 U. S. 176.)

Such a course would obviate the possibility of an unseemly clash between this court and the Territorial Courts and the final review of the matter would be had in the proper appellate court.

In *Kaizo* v. *Henry*, 211 U. S. 146, the plaintiff in error had been indicted for murder by a grand jury sitting in one of the circuit courts of Hawaii. The grand jury was composed of sixteen members, of whom eight were not citizens of the United States or of the Territory, although the laws of the Territory prescribed such citizenship as a qualification for grand jurors. The Territory joined issue and the question was certified to the Supreme Court, which decided against the defendant. Thereupon the trial judge overruled the plea in abatement. After due proceedings he was found guilty and sentenced to death. Thereupon he prosecuted a writ of error to the Supreme Court of the Territory, assigning, among other errors, the overruling of the plea in abatement. The judgment of the lower court was

then affirmed. No writ of error from the final judgment of the Supreme Court was taken, however. Subsequently, the defendant presented a petition to the Supreme Court of Hawaii for a writ of habeas Corpus. That court discharged the writ, and thereupon the case was brought to this Court upon a writ of error to review that judgment. The cause was finally decided here against the defendant upon the ground that the alleged disqualification of the grand jurors, if true, did not deprive the trial court of jurisdiction.

We respectfully submit that inasmuch as it appears from the record that the appellants deliberately pursued a course in the Territorial Courts which prevented a review of the original record by this Court upon writ of error, that there still exists a remedy by habeas corpus in the Territorial Courts which may be finally reviewed by this Court upon appeal or writ of error; and that the record is barren of any unusual or exceptional circumstances—the judgment of the District Court refusing the writ should be affirmed.

IV.

The Judgment of the Trial Court Was Not Void.

It is settled by numerous decisions of this Court that a petitioner who is in custody under the process of another court, whether Federal or State, will be discharged only in the event that the judgment of such court is wholly void because the court was without jurisdiction to enter it. (*Ex parte Watkins,*

3 Peters 192; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *In re Lincoln*, 202 U. S. 178; *Harlan* v. *McGourin*, 218 U. S. 442; *Matter of Gregory*, 219 U. S. 210; *Glasgow* v. *Moyer*, 225 U. S. 420; *Craig* v. *Hecht*, 82 Oct. Term, 1923, decided Nov. 19, 1923.)

The appellants here seek to bring themselves within the rule by averring in their petition that the indictment found against them was subsequently amended without resubmission to the grand jury, and thereby, under the ruling in *Ex parte Bain*, 121 U. S. 1, the jurisdiction of the court to try the offense was lost. The difficulty is, however, that the indictment was not amended. The stipulation which was filed, as appears from its face, did not purport to amend the indictment, but was a mere agreement between counsel by which counsel for the defendant agreed not to take exception to its form, and acknowledged that they were sufficiently informed of the charge which their clients were called upon to answer. The record does not show that the petit jury ever knew of its existence, and the Supreme Court of Hawaii has determined that it did not constitute an amendment. (See *Territory* v. *Goto*, 27 Haw. 65, printed as an appendix to this brief.)

As the indictment was not amended, the question here presented is whether in its original form it was sufficient to give the trial court jurisdiction of the offense. The sufficiency of the indictment has been so fully and so ably discussed in the concurring opinion of Chief Justice Peters of the Supreme Court

of the Territory (see appendix to this brief), and in the brief of other counsel for the appellee in this Court, that we shall not discuss it at any length. The opinion of Judge Peters analyzes the indictment and shows that, even though it be judged by the strict rules of the common law, it is sufficient. But in view of the provisions of the Act of April 28, 1915, Session Laws of Hawaii, p. 307, which added to the Revised Laws of Hawaii of 1915 a new section, No. 3791D, the question is put beyond the range of debate. That section provides as follows:

> *Alternative allegations.*—In an indictment for an offense which is constituted of one or more of several acts or which may be committed by one or more of several means, or with one or more of several intents, or which may produce one or more of several results, two or more of such acts, means, intents, or results may be charged in the alternative.

Under this statute the indictment as drawn was sufficient. (*Bishop's New Criminal Procedure*, 2d. Ed., Vol. 2, Sec. 589.) In the State of Alabama, where similar statutory provisions have been in effect for many years, the Supreme Court has sustained the sufficiency of like indictments.

Johnson v. *State*, 50 Ala. 456.
Horton v. *State*, 53 Ala. 489.
Wilson v. *State*, 84 Ala. 426.
King v. *State*, 137 Ala. 47.
Coleman v. *State*, 151 Ala. 20.

CONCLUSION.

The record fails to show either want of jurisdiction in the trial court or any circumstances of peculiar urgency which would warrant the issuance of the writ of habeas corpus by the District Court, and the decree of that court denying the writ should be affirmed.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

GEO. ROSS HULL,
Special Assistant to the Attorney General.

FEBRUARY, 1924.

APPENDIX.

TERRITORY *v.* I. GOTO ET AL. No. 1416.

Exceptions from Circuit Court First Circuit. Hon. J. J. Banks, Judge.

Argued February 6, 1923. Decided April 26, 1923.

PETERS, *C. J.*, PERRY and LINDSAY, *JJ.*

OPINION OF THE COURT BY LINDSAY, J.

On August 1, 1921, the grand jury of the first circuit returned an indictment against the defendants, the first count charging that defendants "did maliciously or fraudulently combine, or mutually undertake or concert together to commit a felony, to wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon one J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy, or damage a certain house situate at Olaa * * * which said house was being occupied by the said J. Sakamaki as his place of abode, and that they * * * did then and there and thereby commit the crime of conspiracy in the first degree contrary to the form of the statute in such case made and provided." The second charged that defendants "did maliciously or fraudulently combine, or mutually undertake or concert together to commit a felony, to wit, to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance in, at, under, or against a

certain house situate at Olaa * * * which said house was being occupied by one J. Sakamaki as his place of abode, for the purpose of inflicting bodily injury upon him, the said J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy, or damage the said house," etc.

On August 2, 1921, defendants were duly arraigned and their pleas reserved from time to time until September 13, 1921, at which time each of the defendants, being represented by counsel, was asked separately if he understood the nature of the charge against him and if he was ready at that time to enter his plea, which questions being answered in the affirmative, each of the defendants then entered a plea of not guilty.

On January 27, 1922, all of the defendants, through their then attorneys, entered into a written stipulation with the prosecution, which stipulation was approved by the trial judge, stipulating and agreeing "that the indictment and all counts thereof heretofore found against the defendants above named by the grand jury of this judicial circuit on the first day of August, 1921, may and shall be considered and understood as having been found and returned and as reading in the conjunctive instead of in the disjunctive and alternative, and that the said indictment and all counts thereof are not uncertain in that regard or on account thereof, and they, the said defendants, hereby waive any insufficiency in said indictment and all counts thereof by reason of said disjunctive and alternative pleading." At the time the foregoing stipulation was entered into, the grand jury was in session or within call, and an amendment to the indictment or a new indictment might have been obtained.

The trial was commenced on January 31, 1922, and concluded on March 4, 1922, on which date the jury returned a verdict finding all of the defendants guilty as charged.

The attorneys who represented the defendants throughout the trial have brought the case here upon exceptions, none of which go to the insufficiency of the indictment. At the oral argument on the exceptions before this court, one of the attorneys who conducted the trial on behalf of defendants and who had filed a brief herein in support of his bill of exceptions, expressly stated that he considered himself bound by the stipulation entered into by him on behalf of defendants, that he did not propose to and would not now urge that the indictment against defendants was in any manner defective or insufficient, and that any attack that might now be made against the sufficiency of the indictment was entirely without his support or approval. Notwithstanding the stipulation and the attitude of the attorneys who had appeared for defendants throughout the trial, another attorney, appearing in this court for the first time as an attorney for defendants, has filed herein a supplemental brief in which the contention is made that the indictment is not sufficient to charge defendants with the commission of any crime, and that the verdict and judgment of guilty based on such indictment are contrary to the law for that reason. This attorney at the oral argument contended that the stipulation entered into between the other counsel for defendants and the prosecution was equivalent to an amendment of the indictment, and that no amendments to an indictment returned by a grand jury are permissible. He also argued that the attempted waiver is ineffectual. It is conceded by

all of the authorities that amendments of an indictment returned by a grand jury may be made only by that body itself, and that no one else has the right to amend. Passing without further comment, the very unusual situation of defendants who, in one and the same breath and in the same proceeding, say through one attorney that they stand by their waiver and refuse to argue in derogation of the indictment and urge through another attorney that the indictment is bad, we are of the opinion that the stipulation in question can not be construed as amounting to an amendment of the indictment. The trial court did express its approval of the stipulation and of the waiver contained therein, but it did not amend the indictment or attempt or purport to do so.

If it be argued that, by reason of the violation of one of the strict rules of criminal pleading, the indictment was defective (although we do not decide such to be the case as a matter of law), have not the defendants waived whatever rights they may have had to question the sufficiency of the indictment? May a defendant in a criminal case be permitted to play fast and loose with the court by saying, first orally and later more positively in writing, that notwithstanding some apparent defects in the manner of charging him in the indictment, he is not deceived or misled thereby but, on the contrary, is in reality informed and aware of the nature and cause of the accusation against him and waives such defects, and then, after a long and tedious trial and conviction, come before the appellate court and for the first time contend that the conviction must be set aside because the indictment did not as a matter of fact charge him with the commission of any crime because, in the indictment,

the word "or" was used where the word "and" should have been used, and that for that reason he is not informed of the nature and cause of the charge against him? It is not conceivable that such a course of conduct would be permitted among men of ordinary intelligence in dealing with the ordinary and even the weighty affairs of life, yet it is seriously argued that such conduct is permissible in courts of justice. If it might under other circumstances reasonably be said that, by reason of the allegations in question being in the disjunctive instead of the conjunctive, there was some doubt as to what crime defendants were charged with, does it not expressly appear in this case that not a vestige of doubt exists, when the defendants themselves have distinctly and unequivocally said and their counsel "learned in the law" have solemnly stipulated and agreed in writing, that neither the defendants nor their counsel had any doubt whatever of the nature of the accusation against the defendants?

That certain constitutional rights guaranteed to persons accused of crime may be waived has been held in numerous instances. Before Hawaii became a part of the United States and while these islands formed the Republic of Hawaii, the Constitution of the Republic provided that in criminal trials the accused "should in all cases have the right to meet the witnesses who are produced against him face to face," which provision is practically the same as that contained in the sixth amendment to the Constitution of the United States that the accused shall enjoy the right "to be confronted with the witnesses against him." In the case of *Republic* v. *Yamane*, 12 Haw. 189, the defendant with several other Japanese was indicted for murder. Upon a

conviction, exceptions were taken to this court, one of the grounds of exception being that the testimony of the witnesses for the prosecution was given in the English, Chinese, Hawaiian, and Portuguese languages, was not understood by either of the defendants, and was not interpreted or made known to them. Counsel contended that the constitutional right of the accused to meet the witnesses produced against him face to face includes the right to have an opportunity to understand what the witnesses say, that it is a personal right that can not be exercised by counsel, and that it is a right that can not be waived in a capital case. This court held, citing with approval the case of *The King* v. *Ah Har*, 7 Haw. 319, that while the right of the accused to be confronted by the witnesses produced against them clearly included the right to have the testimony of such witnesses interpreted to them, such right might be waived, the court saying, page 220, "the court's attention was not called by counsel or by the defendants to the want of interpretation into the Japanese language, nor was any objection made or exception taken. It is true that the defendants did not expressly waive the right to interpretation, but on the other hand they can not be allowed to quietly stand by and allow the case to proceed throughout a long trial without raising any objection where they are represented by able and competent counsel and then after conviction claim that they did not and could not waive any right in a capital case. That a defendant can waive his constitutional right to be confronted with the witnesses and other constitutional rights even in a capital case. (See *Williams* v. *State*, 61 Wis 281; *State* v. *Wagner*, 78 Mo. 644; *State* v. *Polsen*,

29 Iowa 133; Bish. New Crim. Proc. Vol. 1, section 1205." See also *Diaz* v. *United States*, 223 U. S. 442.)

Other constitutional rights accorded persons accused of crime under the sixth amendment are so frequently waived as to leave no doubt as to the right of such waiver; for example, the right to a speedy trial is frequently waived by the trial being continued for lengthy periods at the request or by the consent of defendant; the right to trial by an impartial jury of the State and district wherein the crime shall have been committed is frequently waived, for not only may accused accept without challenge the first twelve jurors drawn, thus at least tacitly ignoring and waiving the fact that some of the jurors may not be impartial, but accused frequently, by requesting or agreeing to a change of venue, are tried for crimes in districts other than that in which the crime was committed. (See *State* v. *Faile*, 20 S. E. (S. C.) 798.)

As to whether, if an indictment palpably stated no offense at all or the semblance of any offense, an accused could waive his right to be informed of the nature and cause of the accusation against him, under the facts in the present case we are not required to say. There are, indeed, many authorities to the effect that an indictment which, in seeking to inform the accused of the nature and cause of the accusation against him, charges the offense in the disjunctive instead of the conjunctive, is bad, upon the theory that it charges no offense at all. But, as pointed out in *Territory* v. *Kim Ung Pil*, 26 Haw. 725, even the courts which so hold concede that the rule is not without qualifications. Its merits need not be here considered. It is based on a technicality of debatable

substantiality; and when, as in the case at bar, the defendants and their able counsel have solemnly said to the court, after ample time for study and reflection, that they understand the indictment, that the presence of the word "or" does not mislead them or in any wise embarrass them in their defense and that the indictment fully informs them of the nature and terms of the charge against them, the alleged insufficiency or defectiveness of the indictment is one which may be constitutionally waived. Any other conclusion would, we think, be an affront to justice and common sense.

Several of the exceptions are for alleged errors committed by the trial court in allowing the acts and declarations of alleged conspirators to be admitted without any *prima facie* proof of the existence of a conspiracy.

Exception No. 1. Matsumoto, a witness for the prosecution, having testified that the defendant Fujitani had paid him $75 and told him he was to go to Hawaii, was asked whether he had asked Fujitani why he (the witness) was wanted to go to Hawaii. To which question the witness replied, "No, I did not. The only message I got was that I was told Fujitani got a message from Baba" (one of the defendants) "that for me * * * to send me over to the federation office in Honolulu as he wanted me to go to Hawaii. I did not ask him any other questions." Counsel for defendants moved to strike the answer on the ground that it was incompetent and not admissible on any theory at all against the defendant Baba and others, and that it was hearsay. After argument, the trial court denied the motion to strike, the city attorney undertaking to connect up the evidence later on.

Exceptions 3, 4, 5, and 12 are upon similar grounds.

The crime of conspiracy is, from its very nature, most difficult to prove and for that reason great latitude is allowed the prosecution in the manner of presenting its case. "Upon the trial of a charge of conspiracy, where the prosecution depends upon inferences to be drawn from facts to prove the conspiracy, great latitude of proof must be allowed, and the jury should have before them, and are entitled to consider, every fact which has a bearing upon and a tendency to prove the ultimate fact in issue." *United States* v. *Greene*, 146 Fed. 803, and in the same case on page 806 the court says: "How may a conspiracy be proved? By witnesses to the agreement itself, or by proof of facts from which the jury may infer it. Rare, indeed, are the cases where a conspiracy can be proven by witnesses who heard it made. From its very nature it is a secret or furtive agreement. Indeed, a famous writer upon criminal law, Mr. Archibald, declares that: 'A case can not be easily imagined in which a conspiracy can be expressly proven, unless when one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution.'"

By the weight of authority the order in which proof of a conspiracy is offered lies in the discretion of the trial court. The rule is thus stated in a note in 3 Am. St. Rep. 489: "The State may prove the facts in any order it chooses as to conspiracy, and acts done and declarations made. The acts and declarations are sometimes admitted in evidence first, as a matter of convenience, upon an undertaking by the prosecution to subsequently connect the evidence by proof of the conspiracy." (See numerous cases cited.) In *Jenne* v. *Joslyn*, 41 Vt. 478, it was held

that the order of the evidence is of no material consequence so far as its ultimate legitimacy is concerned, provided it is in the end pertinent to the issue in its relation to the other evidence in the case.

"The time of admitting the declarations is a mere question of order in the proceedings which is a matter of discretion with the court. Nothing can be better settled than the main proposition that the declarations of one alleged conspirator can not be admitted against his associates unless the conspiracy be established. There is, however, no rule that the conspiracy must be established first in the order of time. Convenience may require that the declaration be admitted provisionally subject to subsequent proof of the conspiracy. If that is not offered it should be stricken out." *Place* v. *Minster*, 65 N. Y. 89, 105. "When the whole evidence shows that a conspiracy actually existed, it will be considered immaterial whether the conspiracy was established before or after the acts and declarations of the members." *Spies* v. *People*, 3 Am. St. Rep. 320. The rule is admirably stated by Judge Cooley in *People* v. *Saunders*, 25 Mich. 119, where that learned author says: "It is complained that the acts and declarations of Winters were allowed to be given in evidence before proof had been made of any conspiracy. As this exception regards the order of proof merely, we think it is not one that can avail in this court. The proper order of proof in cases of conspiracy is, first, to give evidence of the unlawful combination, and afterward to show the acts of the conspirators in pursuance thereof, or in some manner to connect them severally therewith. But it often happens that the existence of the conspiracy is only made out by inference from the acts and declarations of the several parties

thereto; and to exclude evidence of these until the conspiracy is established in some other way would, in some cases, give the guilty parties immunity. There is no class of cases in which it is more important that the circuit judge should have a large discretion as to the order in which the evidence should be received; and this discretion can not be reviewed on error except in clear cases of abuse, of which we discover no proof here. The opening of the case by the prosecution, and any further explanations that may be called for, will generally enable the judge to exercise his discretion in such manner as, while not shutting out proper evidence, shall at the same time protect the accused from being prejudiced by testimony which, in the end, shall prove irrelevant, or not legally competent to charge the party on trial. And whenever facts are proved which depend upon other facts to give them a bearing upon the guilt of the accused, if such other facts are not put in, he has his remedy by motion to strike out the evidence. * * * Mr. Roscoe justly says that 'The evidence in conspiracy is wider than, perhaps, in any other case. Taken by themselves, the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances.' Ros. Cr. Ev., 88." In a conspiracy case the order of presenting proof is immaterial. *Territory* v. *Soga*, 20 Haw. 71, 76. "The order of proof is a matter largely within the discretion of the trial court. Especially is this true in a prosecution for conspiracy where the facts are ordinarily involved and complicated. The Government has the right to show the whole history of the conspiracy from its commencement to its conclusion, and to do this it may, prior to the in-

troduction of evidence of the conspiracy itself, offer evidence of admissions made by the defendants and other facts and circumstances which, standing alone, would appear immaterial but which are to be connected up and made material by evidence to follow." *Territory* v. *Belliveau*, 24 Haw. 768, 772.

Under the rule enunciated the trial judge, in the exercise of sound discretion, properly allowed the acts and declarations of alleged conspirators to be admitted before proof of the existence of a conspiracy. Such evidence, however, would only become competent if the existence of conspiracy later appeared from the evidence in the case. For that reason it becomes necessary to consider at length the facts which appear or may be inferred from the evidence in the case.

Early in the year 1920 there occurred a strike among the laborers on the sugar plantations on the island of Oahu, which lasted until June 30 of the same year. Prior to the strike a complete system of labor unions throughout the Territory had been organized, each plantation having its own union which took its name from that plantation—for example, the union on Waipahu plantation was known as the Waipahu union, and that on the Waialua plantation as the Waialua union. On each island there was also a union for that island—for example, the Oahu union, the Hawaii union, etc. The personnel of the island unions was made up of representatives from the various plantation unions. In addition to the two classes of unions indicated, there was a supreme union or organization, having its headquarters in Honolulu and known, at first, as the Japanese Federation of Labor, and later as the Hawaii Laborers' Association. The members of this

association, which we shall hereafter refer to as the federation, were called directors, and consisted of persons appointed by the various island organizations. The management and leadership of the strike was in the hands of the federation which, in furtherance of the strike, sent out published instructions to the various districts throughout the Territory and collected funds amounting to nearly three-quarters of a million dollars for the purpose of financing the strike. Although the strike was confined to the island of Oahu, it was aided financially by the various unions on the other islands, which sent contributions to the federation in Honolulu. Picketing gangs were maintained at different points on Oahu for the purpose of preventing laborers from returning to work.

While the strike was in progress one J. Sakamaki, who for many years had occupied an important position with the Olaa plantation, and was assistant postmaster at Olaa, was an active opponent of the strike, speaking against it and mailing and distributing throughout the Territory many printed pamphlets. On the night of June 3, 1920, while Sakamaki and his family were sleeping at his home at Olaa, dynamite was placed under his house and exploded, and, although no loss of life ensued, the house was damaged to a considerable extent.

The indictment named twenty-one persons as having conspired together to cause the unlawful act complained of. Of these, four were not apprehended. The charge against two of the alleged conspirators, viz, J. Matsumoto and I. Saito, was nolle prossed and the remaining fifteen defendants were tried and convicted.

At the time of the alleged conspiracy all of the convicted men were either officials of the federation of labor or connected with the various labor unions on the islands of Oahu and Hawaii. The headquarters of the Oahu union was at the same place in Honolulu as that of the federation.

From the uncontradicted evidence the dynamite which was exploded under Sakamaki's house was placed there by Murakami and Saito. Matsumoto, who, with these two, had been chosen to do the dynamiting, accompanied them to the scene of the explosion, but while the dynamite was being placed under the house did not assist but remained in the motor car with the driver ready to drive with the others away from the vicinity. The charge against Saito and Matsumoto having been nolle prossed, they became the chief witnesses against their alleged coconspirators.

The testimony of Matsumoto is that on May 22, 1920, the defendant Fujitani, secretary of the Waialua union, telephoned to Matsumoto, who was in charge of the picketing at Wahiawa, requesting that he come to Waialua. There Fujitani told Matsumoto that he (Matsumoto) had to go to Hawaii; that orders had been received from the defendant Baba that he (Matsumoto) had to go to Hawaii to do some work and that he was to go to Honolulu and see Baba, from whom he was to obtain particulars. Fujitani then gave Matsumoto $75, saying that if he was going to Hawaii he would need some money for expenses. The following day Matsumoto went to the headquarters of the federation in Honolulu where he met the defendants Baba, Furusho, Kawamata, Takizawa, Tomoda, Hoshino, Tsutsumi, Miyazawa, Goto, and Fujitani. Baba told the witness

that he had to go to Hawaii and that further details would be given him by the directors of the Hawaii union. The other defendants just mentioned also told the witness that he had to go to Hawaii, where he would receive further particulars and orders from the directors of the Hawaii union, some of these defendants further stating that upon the work of Matsumoto on Hawaii depended the success of the strike, and that they wanted him to do the best he could on Hawaii. Later in the day Matsumoto was given a ticket for his passage to Hilo by the defendant Fujitani, who stated that he also was going to Hilo on a speechmaking tour. Matsumoto took passage on the steamer *Mauna Kea* and on arrival at Hawaii put up at the Okino Hotel.

Saito, another witness for the prosecution, testified that on the same day that Matsumoto went to federation headquarters he (Saito) was also ordered to report there. On his arrival at headquarters he met the defendant Furusho, who informed him that one person had been picked from every place on this island to go to Hilo and that he (Saito) had been picked from Waipahu. Furusho told Saito: "There is an order issued from this * * * from the federation to Hilo, and if you go to Hilo you will receive further orders of what you are going to do." (Tr. p. 238.) Kawamata, another of defendants, on the same occasion said to this witness: "It is exactly as Furusho has said to you, that an order from here has gone to the officials of Hawaii; if you will get there you will get further instructions, and I want you to obey the orders of that official." Furusho gave Saito $50, saying that he had not bought a ticket for him but to take the money and pay his fare when he got on board the steamer. Furusho further told Saito [illegible] when he got to Hilo he should put up at the

Okino Hotel. Saito thereupon took passage on the *Mauna Kea* under the assumed name of Akamine, which name he adopted at the suggestion of the defendant Fujitani. On the same steamer were the defendants Fujitani and Murakami, also the witness Matsumoto. Fujitani said he was going to Hawaii on a speech-making tour, but there is no evidence that he made any speeches, and he returned to Honolulu the following week. On arriving at Hilo Saito, Matsumoto, and Murakami all took rooms at the Okino Hotel.

The testimony of the witnesses Saito and Matsumoto as to what took place on the island of Hawaii is practically the same and in substance is that on the day of their arrival in Hilo they reported at the office of the Hawaii union, where they met the defendants Ishida, Koyama, and Miyamura (Miyamura was not apprehended), and were told by these defendants to return to the hotel and that later orders would be given to them. On May 27, 1920, an auto was sent to the Okino Hotel, Hilo, the driver saying in the presence of Matsumoto, Saito, and Murakami that the officials of the Hawaii union had sent for them to get in this automobile, which they did, and were driven to a tea house some four miles distant from Hilo. Here they again met the defendants Ishida, Miyamura, and Koyama, also a man named Yoshimura, who was said to be one of the pickets from Ewa, Oahu. Miyamura stated to Matsumoto, Saito, Murakami, and Yoshimura, in the presence of the others, that orders had been received from the federation office at Honolulu as to what they were to do; that they were to keep the matters secret and were to swear that they would not disclose the matters that were to be discussed there but that if they

did disclose them and thereby bring damage to the strike the federation would publicly condemn their names and those of their relatives in Japan. The four men promised not to disclose, whereupon Miyamura told them that there was a man named Sakamaki, who lived at Olaa, who was obstructing the cause. He told them to kill this man with powder, to use powder on his building and to kill him. The four men agreed, whereupon Miyamura took them outside, one at a time, and gave each of them $100 and told them to do their best. Matsumoto, Saito, and Murakami then returned to their hotel in Hilo. Early next morning Miyamura came to the hotel and told Matsumoto, Saito, and Murakami that he could not find Yoshimura; that Yoshimura had paid his bill at the hotel and run away; that he did not think that Yoshimura would disclose the conversation of the night before, and that in case they should run away he would notify the home Government and publicly suppress the names of their families living in Japan, and that in case they were successful in the dynamiting they would be paid $5,000 each, adding that they had come to Hilo for the cause of 25,000 laborers, and if they were going to help he wanted them to succeed in this undertaking. These three men then said that if the killing of Sakamaki with powder would help the cause of the 25,000 laborers they would do so. That morning one of the three—Murakami—left for Honolulu, from whence he returned to Hilo on the *Mauna Kea* on the morning of June 3, 1920, the day on which the injury to Sakamaki's house occurred, bringing with him from Honolulu some dynamite. Saito testified that Murakami told him that he had gotten the dynamite from the Oahu union. Murakami informed Matsumoto and Saito that every-

thing was ready; that they would do the work that night, and that he, Murakami, would leave for Honolulu the following day. That night Murakami, Saito, and Matsumoto went to Olaa and dynamited the house of Sakamaki. The following morning Matsumoto went to the office of the Hawaii union and obtained $50, which he gave to Murakami for his passage money to Honolulu, and Murakami sailed for Honolulu, Saito and Matsumoto remaining for some time in Hilo. Shortly after this Matsumoto went to the office of the Hawaii union, where he saw the defendants Miyamura, Koyama, and Ishida. He told Ishida that Saito had suggested that he and Matsumoto had better return to Honolulu. Ishida said that it was a good plan, for the police were making a rigid investigation. Ishida told Matsumoto to go back to his hotel and wait for him and that he would bring him the money for their trip. A little later Ishida delivered the passage money, and Matsumoto and Saito returned to Honolulu.

Shortly after his return to Honolulu Matsumoto went to the federation headquarters, where he saw the defendants S. Sato, Tsutsumi, Hoshino, Miyazawa, Goto, Y. Sato, T. Baba, E. Yokoo, F. Koyama, K. Takizawa, K. Furusho, S. Tomoda, Kondo, and Fujitani. Tsutsumi and Hoshino both told Matsumoto that he had made a success of his work in Hilo, and that they had received a report from Hilo that all the spies there were now afraid and that it was a great success. The defendant Baba thanked Matsumoto, stating that he had done well the work he had gone to do. The defendants Takizawa, Kawamata Furusho, Tomoda, Goto, Miyazawa, Kondo, Ishida, S. Sato, and Y. Sato (Y. Sato was not apprehended) thanked him for the work he had done in Hilo in

damaging the house of Sakamaki, and said it was a great success, and that on account of the work he had done the cause was a success. The witness Saito also had a similar talk with some of the defendants.

Matsumoto and Saito, being unable to obtain their promised reward of $5,000 from the officials in Honolulu, again went to Hilo, where they interviewed the defendants S. Sato, Hoshino, and Ishida. These defendants informed the two witnesses that if the officials in Honolulu refused to pay this money the Hawaii union would pay it, Hoshino stating that he was one of the officers of the federation, and that he would have the thing settled. Matsumoto and Saito then returned to Honolulu. Later Hoshino met Matsumoto in Honolulu and promised to present his claim to the federation. Shortly after this Matsumoto had an altercation with Tsutsumi, which ended in Matsumoto's being assaulted, on account of which he lodged a complaint against Tsutsumi with the city and county authorities. Matsumoto was approached by the defendants Baba and Kondo, who told him his claim would be settled, and that he should withdraw his charge of assault and battery. Kondo at that time gave Matsumoto $300 to pay for the injury received by Matsumoto when assaulted by Tsutsumi. Matsumoto threatened to confess the dynamiting matter to the police. Kondo asked him to keep quiet and guaranteed to get for him the promised reward. Later Kondo said to Matsumoto that he had done his best, but was unable to obtain the money. Thereafter Matsumoto confessed to the police authorities.

S. Suzuki testified on behalf of the prosecution that shortly before the dynamiting, he had brought dynamite from Maui and informed the defendants Tsutsumi, S. Sato, and C. Hoshino of that fact. About a

week later at the request of the defendants Furusho and Kawamata, he delivered the giant powder to them at the federation office. On May 5, 1920, Suzuki again went to Maui and procured more dynamite, some of which, together with caps and fuse, he gave to E. Yokoo (one of the unapprehended alleged conspirators).

It is the contention of counsel for defendants that the evidence adduced did not show the existence of a conspiracy on the part of defendants to commit the offense charged in the indictment, hence all of the evidence of acts and declarations of alleged conspirators as testified to by the witnesses Matsumoto and Saito was incompetent. With this contention we can not agree for there was, as shown above, an abundance of evidence tending to show the exsistence of a conspiracy and that all of the defendants were implicated therein. The exceptions on the ground that the court erred in allowing the acts and declarations of alleged conspirators to be admitted are overruled.

The giving of the following instruction for the prosecution is one of the errors assigned:

> I further instruct you that if you find and believe from the evidence beyond a reasonable doubt that J. Sakamaki mentioned in the indictment was obstructing the interests of the Japanese strikers and that some two or more of the persons charged in the indictment did, within the jurisdiction of this court and within the time set forth in these instructions, maliciously or fraudently combine or mutually undertake or concert together to cause by unlawful means the said J. Sakamaki to cease his endeavors to obstruct the interests of the said Japanese strikers and that thereafter others of the defendants did become parties to such combining, undertaking, or

> concerting, or did knowingly participate therein, either on Oahu or on Hawaii, and that in pursuance of the common purpose certain of the persons mentioned in the indictment did unlawfully use and cause to be exploded dynamite or giant powder in the manner alleged in the indictment, at Olaa, District of Puna, County of Hawaii, then you will find all of said defendants guilty as charged, even though the particular means by which the said purpose was to be obtained had not been determined at the beginning and even though such means were not known to all the defendants so long as the act done was the reasonable and probable result of, and reasonably calculated to accomplish, their said purpose.

Counsel for defendants contend that this instruction authorized the jury to convict without having found that the crime was committed by the defendants in the manner alleged in the indictment. It is contended that while the indictment charges defendants with conspiracy to commit the specific offense of unlawfully using dynamite, the jury was instructed to find defendants guilty upon proof of a conspiracy on the part of defendants to cause by unlawful means Sakamaki to cease his endeavors to obstruct the strike. An examination of the instruction complained of does not bear out this contention. It is of course elementary that defendants could be convicted only of the crime charged in the indictment and the jury was explicity instructed to that effect by defendants' instruction No. 2, in which the court told the jury that "before you can convict any one of the defendants it must be clearly proved beyond all reasonable doubt that he conspired with some other person indicted with him to commit the identical offense charged. They must have been

cooperating as conspirators having one common design, for in the absence of a common design there can be no conviction for the act of a mere associate." There was evidence in the case from which the jury might have perhaps inferred that all the details of the conspiracy such as is here involved were not determined upon at one time. From the evidence it could well be inferred that certain of the defendants in Honolulu conspired together to, by unlawful means, for example, by violence towards Sakamaki, remove his opposition to the strike. These conspirators in Honolulu may not at the outset have agreed as to the precise unlawful and violent means to be adopted, but, in the light of all of the evidence, the jury could well have found that they contemplated that violence towards Sakamaki would be resorted to leaving the precise means to be adopted by those of their co-conspirators who were stationed in Hilo. The defendants in Hilo adopted dynamite as the means to be employed towards silencing Sakamaki's antistrike activities, and that means being one that was reasonably and probably adapted and calculated to accomplish by violence the unlawful purpose in view, all of the defendants are chargeable with the means thus resorted to by their co-conspirators. "A conspiracy may be inferred where it is shown that any two or more of the parties charged aimed, by their acts, to accomplish the same unlawful purpose or object, one performing one part and another another part of the same, so as to complete it, although they never met together to concert the means or to give effect to the design." *United States* v. *Sacia*, 2 Fed. 754; *The Mussel Slough Case*, 5 Fed. 680. "Conspiracy implies concert of design and not participation in every detail of execution. Nor

is it necessary that the plan of a combination shall embrace in detail in its early stages the various means by which it is to be executed, as it is sufficient that there is a general plan to accomplish the result sought by such means as may from time to time be found expedient." 12 C. J. 545.

If the jury had found that the acts of the defendants on the island of Hawaii were the product of an independent conspiracy, not connected with nor in furtherance of a conspiracy that had originated in Honolulu, or that the means adopted by defendants in Hilo to silence Sakamaki were not reasonably and probably calculated to accomplish the purpose of the Oahu conspirators, no conviction of the defendants would have been warranted, and the trial court was careful so to instruct the jury, giving the following instructions:

> (4) I instruct you, gentlemen of the jury, that if you find that the acts at Olaa were in consequence of an agreement or conspiracy and formed entirely at the tea house in Hilo, and not in furtherance of the conspiracy formed on Oahu, then under this indictment you must find all of the defendants not guilty as the venue is laid in Oahu.
>
> (8) If you are not satisfied beyond all reasonable doubt that a common design as determined upon by defendants contemplated the acts committed in Olaa, or if you believe that the violence at Olaa may have been the unauthorized and individual acts of some one or more of the defendants acting upon their own responsibility and volition and not in furtherance of the common design, then the other defendants cannot be held responsible and you must find them not guilty.

"The addition of new parties after a conspiracy is formed does not necessarily destroy the identity of the conspiracy but it continues as the same conspiracy. *United States* v. *Nunnemacher*, 7 Biss. 111." Note, 3 Am. St. Rep. 477. "The rule is that each conspirator is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design." Note in *Spies* v. *People*, 3 Am. St. Rep. 477, and cases cited. "Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged." *Republic* v. *Yamane*, 12 Haw. 189, 207. "If several persons take several steps all tending towards one obvious purpose, it is for the jury to say whether those persons had not combined together to bring about that end which their conduct so obviously appears adapted to effectuate. *Regina* v. *Duffield*, 5 Cox C. C. 404." Note, 3 Am. St. Rep 476.

Perhaps from the facts in this case the prosecution might well have charged defendants with a conspiracy to do bodily violence to Sakamaki, or to destroy his house, and have omitted from the indictment any mention of the means resorted to for that purpose,

but inasmuch as an overt act was committed in furtherance of the design of the conspiracy, the charge that the conspiracy was formed for the commission of the offense constituted by such overt act was proper. As said by Cooley, C. J., in a case where the charge was a conspiracy to defraud generally: "A better method no doubt would have been, when the fraud had been actually accomplished, to allege a conspiracy to cheat and defraud the bank which was actually defrauded, for the overt act had then made specific and certain what before was general and uncertain." *People* v. *Arnold*, 46 Mich. 268, 272.

In the light of all of the evidence adduced in this case we are of the opinion that the trial court committed no error in giving the instruction complained of.

Another exception is to the giving of the following instruction on behalf of the prosecution:

> I further instruct you that if you find from the evidence beyond a reasonable doubt that the acts at Olaa were in consequence of an agreement formed at the tea house at 4 Miles near Hilo and that such agreement was in furtherance or continuation of a conspiracy formed on Oahu, such evidence is sufficient to prove that the conspiracy charged in the indictment was, as a matter of law, committed on Oahu.

At the request of counsel for defendants the trial court also instructed the injury in this connection that:

> If you find that the acts at Olaa were in consequence of an agreement or conspiracy & formed entirely at the tea house in Hilo, & not in furtherance of a conspiracy formed on Oahu, then under this indictment you must

find all of the defendants not guilty as the venue is laid in Oahu.

If the unlawful agreement be entered into in one county, and the conspirators go into another county to execute their plan of mischief, and there commit an overt act, such overt act of any one of the conspirators in furtherance of the common design is considered in law a renewal or rather continuance of the original agreement by all the conspirators and the venue may be laid in the county where the agreement was entered into or where an overt act was done by any of the conspirators in furtherance of their common design. "In such case we are to view the overt act, wherever committed, as a renewal of the original conspiracy by all the conspirators." Whart. Cr. L., Sec. 1664. (See *People* v. *Mather*, 4 Wend. 229.) In the case of *Commonwealth* v. *Corlies*, 3 Brewst. (Pa.) 575, the contention was that there was no evidence of a conspiracy in the State of Pennsylvania; that if any conspiracy existed at all it was in the State of New York, to which jurisdiction defendants could be held accountable. The court said, p. 578, "In conspiracy the offense undoubtedly is the combination; when that is established the crime is complete. The overt act is evidence of the crime." In the instant case there was ample evidence from which the jury could infer that the conspiracy complained of was formed in Honolulu and that all of the acts on Hawaii were but a renewal or continuance of the conspiracy which originated in Honolulu. Such being the case the instruction complained of, qualified as it was by the instruction given at defendants' request, was properly given. The exception is overruled.

Exceptions 34, 35, and 36 are to the giving of the following instructions on behalf of the prosecution:

> I further instruct you that if you find from the evidence beyond a reasonable doubt that the overt acts were committed, the fact that one or more of the defendants may not have participated in the doing of said overt acts would be no defense, provided you further find that such defendants were parties to a conspiracy to do the same with those who actually did the said act as when the conspiracy is once established the acts and declarations of any one conspirator in furtherance of the common design become the acts and declarations of all. They are in the eyes of the law one man; they breathe one breath; they speak one voice; they wield one arm; and the law says that the acts, the words, the declarations of any of them, while in pursuit of the common design, whatever unlawful means are chosen by him in pursuit of the common design are the acts, the words, and the declarations of all.
>
> I further instruct you that the evidence in proof of a conspiracy will, in general, be circumstantial and although the common design or plan in the minds of the alleged conspirators is a necessary element in the crime charged, it is not necessary to prove that the defendants came together and actually agreed, in terms, to have that design or plan and to follow it together. It is sufficient if you believe from the evidence beyond a reasonable doubt, from the acts and/or declarations of the parties and from all the facts and circumstances in evidence, that the defendants did pursue a common design or plan by any of the unlawful means charged in the indictment, one performing one part and another another part, so as to accomplish the common object; and if you so believe, beyond a reasonable doubt, then you are justified in the conclusion that the

defendants were engaged in a conspiracy to effect such common object by unlawful means and you should return a verdict of guilty as charged.

I further instruct you, as a matter of law, that all who take part in a conspiracy after it is formed and while it is in execution, and all who, with knowledge of the facts, concur in the plans originally formed and aid in executing them, are fellow conspirators. Their concurrence, without proof of an agreement to concur, is conclusive against them. They commit the offense when they become parties to the transaction or when they further the original plan.

These instructions fairly and properly state the law applicable to the case and the exceptions to the same are overruled.

Exceptions 37, 38, and 39 are to the verdict, the judgment and sentence, and the denial of a motion for a new trial. Evidence in the case being amply sufficient to warrant the verdict of the jury, these exceptions are overruled.

Exception 6 is to the denial of the motion to strike the testimony of Matsumoto to the effect that Saito told the witness that Murakami told Saito that he, Murakami, had brought some powder from Honolulu which he intended to use. The motion was that the testimony "be stricken as hearsay; no showing of any conspiracy as charged." This exception relates to a conversation which took place in the automobile near the scene of the explosion. At that time there were seated in the automobile Murakami, Saito, and Matsumoto. Murakami, who is one of the defendants, being present at the time, it is doubtful whether the testimony is hearsay, but even if it be so considered, its admission does not constitute pre-

judicial error since Saito himself testified that Murakami on the same occasion told him "I got some powder that has been kept by the Oahu union and we have to do this work right away." Where hearsay evidence has been improperly admitted but there is other evidence covering the same ground, the error is cured. *The King* v. *Akana*, 7 Haw. 549, 552; *Territory* v. *Dengiro*, 15 Haw. 64, 66. "The admission of incompetent evidence of a material fact is an error without prejudice when the fact is proved by other competent and undisputed evidence." *Matsumoto* v. *County of Hawaii*, 19 Haw. 496. Exception overruled.

Exception 2 is to the denial of a motion to strike as hearsay the testimony of Matsumoto to the effect that the driver of the automobile told the witness in the presence of Murakami and Saito that the officials of the Hawaii labor union wanted these three men to go on the automobile to the tea house near Hilo. Matsumoto had previously testified that when he reported to the officials at Hilo for orders he was told to go back to his hotel and that later orders would be issued to him. Later an automobile came to the hotel and in the presence of Murakami, Matsumoto, and Saito, the driver stated that the officials of the Hawaii labor union wanted the three men to ride in this automobile, which they accordingly did and were driven to the tea house. In view of the evidence that the labor officials had indicated that orders to these men would soon be forthcoming, the admission of the statement of the driver of the automobile was harmless. Exception overruled.

Exceptions 7, 8, 9, and 10 are to the admission of conversations between Matsumoto and Saito after

the consummation of the purpose of the alleged conspiracy.

It appears from the transcript that, over the objection of counsel for the defendants, the witness Matsumoto was allowed to testify to certain conversations he had in Hilo, on the steamer and in Honolulu with Saito shortly after the explosion. This evidence was admitted at a session of court on Friday. At the opening of the next session of court on Monday morning, the court said:

> Gentlemen, before we proceed this morning, on Friday I overruled an objection to some testimony, and upon reflection I think that I should have sustained the objection. Judge Lymer, it was this, permitted against the defendants' objection: Testimony showing conversation between Saito and Matsumoto after the * * * after testimony had been introduced tending to show that Sakamaki's house had been injured by explosion, a conversation entirely between Saito and Matsumoto, about being better for them to get out of town or something of that sort—I don't know that I quote the exact language. I don't think that any conversation between Saito and Matsumoto after the consummation of the alleged conspiracy, had between them alone in the absence of any of the other defendants, is admissible, because Saito and Matsumoto are not now under indictment and I don't think that it is admissible, and I am going to correct what seems to me to have been an error in the admission of it, and I will sustain your objection to that evidence and I will now instruct the jury that they are not to consider it at all. I regret that the reason for sustaining your objection did not occur to me at the time.

Gentlemen of the jury, you have heard what I have said to Judge Lymer and I will ask you not to consider the testimony that was offered on Friday of a conversation between Saito and Matsumoto in Hilo after the explosion * * * testimony tending to show the explosion. You will not consider that evidence at all, nor any evidence of conversation between Matsumoto and Saito on the boat coming back from Hilo to Honolulu. No conversation between Saito and Matsumoto after the alleged explosion—just conversation held between the two of them—would be admissible in evidence and you will not consider that testimony at all; you will dismiss that testimony from your minds and in your consideration of the case you will not pay any attention to that at all. Is that explanation sufficient, gentlemen?

Mr. LYMER. I think your Honor's statement is absolutely correct, only we wish the record to show that the defense feels that this mode of correction does not cure the error in your Honor's prior ruling. Other than that your Honor has dealt with it adequately and fairly. Your Honor gets my point?

The COURT. Yes.

Mr. LYMER. We wish to make the contention and we do claim that a somewhat belated instruction of this nature does not cure the error. Otherwise, your Honor, we agree that——

The COURT. Very well. You may proceed, gentlemen.

When the case was submitted to the jury the court also instructed the jury as follows:

Gentlemen of the jury, I instruct you that the defendants in this case stand charged in the indictment with the crime of conspiracy in

the first degree. You are the exclusive judges of the facts in this case and the credibility of the witnesses, but the law you must take from the court to be the law notwithstanding any opinion that you might have as to what the law is or should be.

I further instruct you that the declarations of a conspirator after a conspiracy has ceased to exist and which are merely narrative of past events shall be considered against such conspirator only and shall not be considered evidence against any other conspirator not present at the time such declarations were made. If such other conspirator were present, however, when such declarations were made and heard them and expressly or by implication acquiesced in them, then the same may be considered against such other conspirator.

In *Kaleleonalani* v. *Smith*, 4 Haw. 82, 86, the trial court had admitted incompetent evidence. After all the evidence was in the court instructed the jury that that evidence had failed altogether, that it must be excluded from consideration because it had proved nothing. On exceptions to this court this court said: "If evidence has been wrongly admitted because it was incompetent or irrelevant, and if the judge shall, upon its appearing to be such, instruct the jury to disregard it, it is not a ground of exception. The jury is sworn to render verdict according to law, and, by our statute, must receive the law from the court. When the court has instructed that something which they have heard is not to be considered by them, we must presume in favor of their oath and public duty. It is true this presumption might be overcome by their rendering a verdict which had no evidence to support it but that which had been excluded by the court." (See also *Stone* v. *Hutchinson*, 4 Haw. 117 at 121.)

In *The King* v. *Paakaula*, 3 Haw. 30 at 34, the court said: "It is contended further by the counsel for the prisoners that as testimony was admitted on the trial which was subsequently ruled out, the presumption is that it left an impression on the minds of the jury adverse to the prisoners, and therefore a new trial should be granted. It occasionally happens that testimony is admitted and subsequently ruled out; but in such cases the court should expressly declare to the jury, as was done in this case, that the testimony is to be entirely disregarded, and it is the solemn duty of the jury to regard the charge. This is not unfrequently done in the course of a trial, but it is a new doctrine that it should defeat the whole proceedings."

The court having ordered the offensive evidence stricken and carefully instructed the jury to disregard the same and there being ample other evidence to support the verdict, we are of the opinion that no such error has been committed as to warrant the granting of a new trial.

Exceptions 25 and 26 are to the allowing of the defendant Miyazawa to be cross-examined as to other crimes not shown to have been committed. The defendant Miyazawa took the stand and was examined at considerable length. He testified that he was one of the secretaries of the federation and denied any knowledge of or connection with the alleged conspiracy. He identified the constitution and by-laws of the federation, also certain circulars that were circulated and articles that were published during the strike, all of which were offered and received in evidence on behalf of defendants as tending to show that the federation deprecated violence and counseled that only peaceful

methods be used in the settlement of the strike. This defendant testified that he and another man were the authors of the circulars and publications mentioned. He admitted that pickets were maintained on the various plantations and gave further evidence concerning the federation, its officials, the scope of its activities and operations. On cross-examination, over the objection that it was incompetent, irrelevant, and immaterial and not proper cross-examination, the prosecution was allowed to interrogate this defendant as to whether he knew of any dynamite having been placed under the house of a man at Ewa during the strike; whether he knew anything about the placing of dynamite by certain Japanese under the house of a Filipino at Waipahu during the months of April or May, 1921, because this Filipino was working against the strike. Defendant answered these questions in the negative and was then asked whether he knew anything about an assault committed on a Filipino at Waipahu on March 10, 1920, by the defendant Furusho and certain others, to which defendant answered that he knew of that case because it was tried in court and upon a conviction carried to the supreme court where it was subsequently stricken because a transcript had not been furnished.

Just how far the discretion of the trial court will be interfered with for permitting a wide range in the cross-examination of a defendant who testifies on his own behalf, the authorities are somewhat in conflict, but all the authorities agree that the limit of cross-examination is largely a matter in the sound discretion of the court.

In the present case the facts which were apparently sought to be established by this witness and

the documentary evidence were that it was improbable that either the defendant or the organization with which he was connected had participated in the alleged conspiracy to commit violence, because this defendant and the organization had discountenanced all resort to violence. Such being the nature of the evidence given, the prosecution was entitled, by cross-examination, to subject the witness to a searching examination as to the truth or falsity of the evidence given. "When a party places a witness upon the stand to testify to facts which tend to support his side of the issue involved, and questions him concerning such facts, it is the right of the opposite party, on cross-examination, to go as fully into the subject as may be necessary to draw from the witness all he may know concerning the transaction about which he has testified, and to put before the jury any pertinent facts which will have a tendency to controvert the testimony which has been given by the witness in favor of the party calling him. A more restricted rule renders cross-examination in many cases nearly valueless, and enables a party, by careful questions to his witness, to give to the jury a one-sided and partial view of the facts within the knowledge of the witness, and effectually to preclude the opposite party from supplementing the witness's statement with the further facts within his knowledge concerning the same transaction." *Detroit & Milwaukee R. R.* v. *Van Steinburg,* 17 Mich. 99, 109. "The scope and extent of the cross-examination of a witness is largely a matter of administration by the presiding judge. It is a question for him to determine in each case, guided by sound reason. Ordinarily much latitude will be given. The apparent knowledge of the witness, ac-

companied by an evident inclination to withhold it from the court, his power to understand the situation and remember facts, his interest or bias and the like are all factors which will be considered by the presiding judge in this connection, having in view in each case the discovery of the truth. According as the necessities of the case may seem to him to require, he may limit or extend the scope of the cross-examination. If, in his judgment, it is being unreasonably protracted he may refuse to permit it to be further extended; if on the other hand he deems it essential to the discovery of truth, he may allow a wider latitude." Chamberlayne on Ev., sec. 3723. "The allowance or exclusion of questions as to irrelevant facts is a matter of administration by the presiding judge, in the exercise of sound reason." Chamberlayne on Ev., sec. 3726.

Under the facts in this case we are not prepared to say that the judge erred in permitting the cross-examination complained of.

Exception 27 is similar to exceptions 25 and 26 and relates to the allowing of cross-examination of the defendant Kawamata. Under all the facts in the case we are of the opinion that the circuit judge did not abuse his discretion in allowing the cross-examination complained of.

Exceptions 17, 18, 19, and 20 are to the admission of evidence by the witness Suzuki regarding dynamite. This witness having testified that he had brought giant powder from Maui further testified that the defendants Furusho and Kawamata came to him and told him to hand over to them the giant powder that he had brought; that he asked them what they wanted to use it for and they said they wanted to blow up Kipapa bridge. The witness

further testified that he gave two sticks of dynamite to Furusho in the early part of April, 1920, at the federation office in the presence of the defendant Kawamata. The same witness also testified that at a tea house in Honolulu a few days before May, 1920, he had a talk with the defendants Tsutsumi and Sato who asked him to get a pistol and giant powder. The witness further testified that he had gone to Maui and procured more dynamite which he gave to various of the defendants. Counsel for the defense moved to strike all of the evidence of this witness concerning the dynamite on the ground that it was not competent, relevant, or material and had no bearing on the issues involved. The motion to strike was properly overruled for it was clearly within the province of the prosecution to show that defendants were in the possession of dynamite, the instrument with which the overt act was committed.

All of the other errors assigned have been carefully considered and we find no merit in them. The exceptions are overruled.

W. H. Heen, city and county attorney (*H. E. Stafford*, first deputy, city and county attorney, with him on the brief), for the Territory.

S. B. Kemp, *W. B. Lymer*, and *Marguerite K. Ashford* (*Watson & Lymer*, *Marguerite K. Ashford*, and *S. B. Kemp* on the briefs) for defendants.

CONCURRING OPINION OF PETERS, C. J.

One of the appellants' counsel complains that the indictment herein is uncertain and therefore insufficient and fatally defective for the reason that the acts, to wit, "combination or mutual undertaking or concerting together," and the terms descriptive of those acts, to wit, "malicious and fraudulent," con-

tained in the statute defining conspiracy (sec. 4076, R. L. 1915), as well as the means employed and the unlawful purposes to be effected as enumerated in the statute defining the offense of unlawful use of explosives (sec. 4028, R. L. 1915), are alleged in the alternative.

Section 4076, R. L. 1915, defines conspiracy as follows: "A conspiracy is a malicious or fraudulent combination or mutual undertaking or concerting together of two or more, to commit any offense or instigate any one thereto, or charge any one therewith; or to do what plainly and directly tends to excite or occasion offense, or what is obviously and directly wrongfully injurious to another."

Section 4028, R. L. 1915, defines the unlawful use of explosives as follows: "Any person unlawfully using dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon, or to terrify and frighten, any person, or to injure or destroy any property, or damage the same in any manner, shall be liable, upon conviction, to pay a fine of not less than two hundred and fifty dollars, nor more than five thousand dollars, and to imprisonment at hard labor for a term not to exceed twenty years."

Ordinarily where a statute defining a criminal offense enumerates in the disjunctive two or more acts, the commission of any one of which would constitute a separate and distinct offense, such acts may not be alleged in the alternative in the same count of an indictment. Nor may two or more intents be alleged in the alternative in the same count of an indictment as qualifying a single act denounced in a statute as criminal when committed with any one of such intents. To do so renders the count of the indictment

uncertain and hence insufficient and fatally defective. All allegations in the alternative are not, however, fatal to an indictment. There are several generally accepted exceptions to the rule, within which the alternative allegations found in both counts of the indictment herein fall.

Were both counts of the indictment in the instant case within the rule and the provisions of the simplified Criminal Procedure Act (sec. 3791D, R. L. 1915, Act 215, S. L. 1915) incapable of curing the defect nothing that the defendants might do either expressly or by implication could alter the situation and they would be entitled to their discharge upon appropriate proceedings attacking the sufficiency of the indictment. That the defendants under such circumstances failed to demur to the indictment or expressly stated that they understood it or expressly agreed that the indictment should read differently than it does and that the uncertainty now complained of should be removed by the substitution of certainty, would be immaterial. Failure of an indictment to state facts sufficient to constitute an offense against the law is jurisdictional and is available to the defendant at any time. The fifth article of the amendments of the Constitution provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury * * *." Article VI of the amendments of the Constitution provides: "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *." The effect of these provisions is to entitle the defendant, charged with a capital or otherwise infamous crime (the crime of conspiracy in the first degree is an in-

famous one), to be informed of the nature and the cause of the accusation against him by an indictment as known at common law. *Mott* v. *State*, 29 Ark. 147, 149; *Eason* v. *The State*, 11 Ark. 481, 500; *State* v. *Kyle*, 166 Mo. 287, 56 L. R. A. 115, 120; *Ex parte Slater*, 72 Mo. 102, 106; *Hewitt* v. *State*, 25 Tex. 722; Joyce on Indictments, Secs. 11, 12. These provisions of the Constitution cannot be waived. They are not solely for the benefit of the accused. The public is interested. *Renigar* v. *The United States*, 172 Fed. 646, 656; *Ex parte McClusky*, 40 Fed. 71, 74. An indictment as thus defined is essential to the court's jurisdiction. *Renigar* v. *United States*, *supra; Ex parte McClusky, supra; Ex parte Bain*, 121 U. S. 1, 12.

The question of waiver is not involved because both counts of the indictment are good. And this is so irrespective of the provisions of Act 215, S. L. 1915.

Where the words or terms alleged in the alternative are synonymous an indictment is not within the rule against alternative allegations. The word "combination" and the phrases "mutual undertaking" and "concerting together" are synonymous. The legislature certainly did not intend to make separate and distinct offenses of the several acts denounced by the statute when maliciously or fraudulently committed. Under the circumstances the allegation of the several acts in the disjunctive, that is to say, that the defendants did "combine or mutually undertake or concert together" does not render the indictment bad.

Nor does the description of the "combination or mutual undertaking or concerting together" as "malicious or fraudulent" render the counts of the

indictment fatally defective. These terms are obviously not synonymous. Both terms are contained in the statutory definition of the offense. But where after the rejection of allegations in the affirmative the indictment or counts of an indictment containing such allegations fully advise the defendant of the nature and the cause of the accusation against him, the constitutional requirements have been fully met.

Conceding to the authorities the effect that the indictment by reason of the alternative allegation "maliciously or fraudulently" neither charges that the "combination or mutual undertaking or concerting together" was "malicious" nor "fraudulent" I am of the opinion that even after the rejection of both terms and considering the indictment as though both terms were absent therefrom the indictment is sufficient. To unlawfully use dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon or to terrify and frighten any person or to injure or destroy any property or damage the same in any manner is a malicious act as the term "malicious" is defined by section 3663, R. L. 1915. The object of the conspiracy as alleged in the indictment was "to unlawfully use and cause to be exploded dynamite or other explosive chemical or substance for the purpose of inflicting bodily injury upon one J. Sakamaki, or to terrify and frighten him, the said J. Sakamaki, or to injure, destroy, or damage a certain house * * * which said house was being occupied by the said J. Sakamaki as his place of abode * * *." The object of the conspiracy was therefore malicious. The conspiracy was thereby rendered malicious. The indictment therefore alleges the conspiracy as malicious.

Ordinarily where a statute attaches to an offense certain technical predicates these predicates must be employed in an indictment charging such offense. As a rule it is not prudent to substitute other terms for those employed in the statute. But it may be done where the word or term substituted is equivalent to the word or term used in the statute or is a more extensive signification and includes it. *People* v. *Vance*, 21 Cal. 400; *Williams* v. *State*, 64 Ind. 553; *State* v. *George*, 34 La. Ann. 261; *Roberts* v. *State*, 55 Miss. 421; *State* v. *Watson*, 65 Mo. 115; *Tully* v. *People*, 67 N. Y. 15; *Eckhardt* v. *People*, 83 N. Y. 462; *State* v. *Thorne*, 81 N. C. 555; *United States* v. *Nunnemacher*, Fed. Cas. No. 15,903; *King* v. *Brady*, 1 Bos. & Pul. 187, 126 Eng. Rep. 851.

A conspiracy may be "malicious" or "fraudulent" accordingly as its object is a malicious or fraudulent act or the means to be employed be malicious or fraudulent although the object of the conspiracy be lawful. The allegation of the malicious object of the conspiracy is tantamount to the allegation of a malicious conspiracy. It is a substitute of the technical predicate "malicious" as contained in the statutory definition of conspiracy. The language of the indictment inevitably implies that the conspiracy was malicious. The allegations of the object of the conspiracy qualify and describe the conspiracy. They supply and in terms are a substitute for the word "maliciously" as fully as though the word "maliciously" were present in the indictment. The indictment fully advised the defendants that they were charged with a malicious conspiracy to terrify and frighten J. Sakamaki or inflict bodily injury upon him or injure or destroy his property by the unlawful use of dynamite or other explosive chemical or substance.

A case peculiarly in point is that of *Tapack* v. *United States*, 220 Fed. 445. There the defendants were charged under section 5440 of the Revised Statutes of the United States (Sec. 37, Penal Code of 1909) with conspiracy to violate the provisions of section 29b (1) of the Bankruptcy Act, which made it an offense for anyone to "knowingly and fraudulently" conceal while a bankrupt or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. In substance the indictment charged that the defendants in order to defraud the creditors of the bankrupts did corruptly, wickedly, and unlawfully conspire, etc., with the bankrupts to conceal their property and to continue to conceal the same after they should be adjudicated bankrupts and that after the adjudication in bankruptcy they did secrete and conceal the said property and continued to secrete and conceal the same. The words "knowingly and fraudulently" were omitted from the indictment and those terms as descriptive of the act of concealment as contained in the statute defining the offense which was the object of the conspiracy were totally absent. The court sustained the indictment, using the following language (p. 447): "In earlier days, when excellent reasons existed for construing an indictment strictly so as to favor life and liberty, it is probable enough that such an indictment as this might have been held deficient in precise statement; and, indeed, some comparatively recent decisions still reflect something of the earlier spirit. But there can be no doubt that the prevailing tendency now, both in statute law and in decision, is to be satisfied with substance rather than to insist upon rigid adherence to form; an indictment will be held good if it substantially charge the particular offense

for which the defendant is about to be, or has already been, tried. *Burton* v. *U. S.*, 202 U. S. 344, 25 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; *Dunbar* v. *U. S.* 156 U. S. 195, 15 Sup. Ct. 325, 39 L. Ed. 390; *McNiel* v. *U. S.*, 150 Fed. 82, 80 C. C. A. 36; *State* v. *Stein*, 48 Minn. 466, 51 N. W. 474; *State* v. *Smith*, 63 Vt. 201, 22 Atl. 604; *Worsham* v. *Murchison*, 66 Ga. 715."

Nor do the allegations in the disjunctive of the explosives to be employed and the purposes of their unlawful use render the indictment uncertain or defective. The gist of the offense is the conspiracy. The indictment in terms alleges that the conspiracy was formed to use dynamite or other explosive chemical or substance to accomplish any one of the unlawful purposes denounced by the statute. It charges in effect that although the means to be employed and all the purposes to be accomplished were contemplated by the conspirators the selection of those means and the unlawful use to which they were to be put were optional. In other words, it charges that the defendants conspired to employ alternate means to bring about alternate results. They did not conspire, according to the indictment, to conjunctively use all the means nor to conjunctively accomplish all the purposes enumerated in the statute. Were the substantive offense defined by section 4028, R. L. 1915, the sole subject of the indictment, obviously neither the means nor the purposes of the unlawful use enumerated in the statute could properly be alleged in the disjunctive. But here the indictment is conspiracy. However many crimes may have been contemplated by the conspirators, the conspiracy to commit such crimes was but a single offense. I see no difference in principle between a

conspiracy to commit some one or all of several criminal acts and a conspiracy to commit several criminal acts. An indictment charging a conspiracy to commit more than one criminal act is not duplicitous. *State* v. *Sterling*, 34 Ia. 443–444; *United States* v. *Aczel*, 219 Fed. 917, 921; *John Gund Brewing Co.* v. *United States*, 206 Fed. 386; *State* v. *Dyer*, 32 Atl. (Vt.) 814, 817; *United States* v. *Eccles*, 181 Fed. 906, 908. The converse is necessarily true that a conspiracy may be formed to commit any one or all of several offenses. If so, it should be so alleged and necessarily the offenses which are the alternate objects of the conspiracy should be and could only be alleged in the disjunctive.

By the indictment in the case the constitutional guaranties afforded the defendants were fully observed. It may not be inappropriate to conclude by adopting the language of the United States Supreme Court in the case of *Burton* v. *United States*, 202 U. S. 344, at 372. With the substitution of appropriate language indicating its application to all of the defendants the citation is particularly apt: "* * * the accused was informed with reasonable certainty by the indictment of the nature and cause of the accusation against him * * *. The averments of the indictment were sufficient to enable the defendant to prepare his defense, and in the event of acquittal or conviction the judgment could have been pleaded in bar of a second prosecution for the same offense. The accused was not entitled to more, nor could he demand that all the special or particular means employed in the commission of the offense should be more fully set out in the indictment. The words of the indictment directly and without am-

biguity disclosed all the elements essential to the commission of the offense charged, and, therefore, within the meaning of the Constitution and according to the rules of pleading, the defendant was informed of the nature and cause of the accusation against him."

I agree in all other respects with the majority opinion and join in the conclusion that the defendants' exceptions should be overruled.

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GOTO ET AL. *v.* LANE, HIGH SHERIFF OF THE TERRITORY OF HAWAII.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

No. 463. Argued February 28, 29, 1924.—Decided June 2, 1924.

1. In the federal courts a discharge on *habeas corpus* of a prisoner confined under a criminal accusation or conviction, is granted only in the exercise of a sound judicial discretion. P. 401.

2. The instances in which this remedy is granted, when the law has provided another remedy in regular course, are exceptional and usually confined to situations where there is a peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void. P. 401.

3. Petitioners were convicted of an infamous crime in the Circuit Court of Hawaii, under an indictment phrased disjunctively but which they stipulated should be construed conjunctively; on exceptions reserved at the trial they contended in the territorial Supreme Court that the indictment was bad for uncertainty, under the Sixth Amendment, and the stipulation void as an amendment of the indictment without resubmission to a grand jury, in contravention of the Fifth Amendment; following local practice, the Supreme Court overruled the exceptions without entering a judgment affirming the conviction which would have been reviewable here; and thereafter the petitioners renewed the constitutional objections by their petition for *habeas corpus* in the United States District Court for Hawaii.

Held: (a) That the territorial trial court had jurisdiction to decide upon the construction of the indictment, its sufficiency and the effect of the stipulation, and its judgment, if erroneous, was not void, even though the application of constitutional principles was involved. P. 402.

(b) The stipulation was not an amendment of the indictment. *Ex parte Bain*, 121 U. S. 1, distinguished. *Id.*

(c) Relief should have been sought by writ of error from the Hawaiian Supreme Court, whose judgment, if it affirmed the conviction, would have been reviewable here. *Id.*

(d) Allowing the time to elapse within which a writ of error might have been taken, gave no right to *habeas corpus* as a substitute. *Id.*

Affirmed.

APPEAL from a judgment of the District Court for Hawaii refusing a writ of *habeas corpus*.

Mr. Thomas W. Gregory for appellants.

The imprisonment of appellants under sentence of conviction based on an indictment amended without resubmission to the grand jury is in violation of the Fifth Amendment. *Ex parte Bain*, 121 U. S. 1; *Calvin* v. *State*, 25 Tex. 789; *People* v. *Campbell*, 4 Parker's Crim. Rep. (N. Y.) 386.

The respondent will not be heard to say that the prosecution in procuring the stipulation in question, and the circuit judge in writing his approval thereon, did an idle thing. It is clear, both from reason and authority, that this stipulation effected an amendment of the indictment just as much as if the word "or" wherever it occurs therein had been erased and the word "and" inserted in lieu.

The only difference between the *Bain Case* and this case, so far as the question under discussion is concerned, is that Bain was tried in a federal court while appellants were tried in a territorial court. If they had been tried in a state court this difference might have become important, but it will hardly be questioned that the Fifth Amendment applies to the courts of the Territory of Hawaii. See *Thompson* v. *Utah*, 170 U. S. 343; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Rassmussen* v. *United States*, 197 U. S. 516; *Queenan* v. *Territory*, 11 Okla. 261; *Territory* v. *Blomberg*, 2 Ariz. 204; *Miller* v. *State*, 3 Okla. Cr. Rep. 457.

This is not a case where a constitutional right has been waived, but where a specific prohibition of the Constitution has been violated.

Appellants should not be remitted to a remedy by appeal to this Court from the Supreme Court of the Territory of Hawaii, or by writ of error from this Court to the Supreme Court of Hawaii.

After their conviction in the Circuit Court of the Territory of Hawaii, the defendants presented their case in the Supreme Court of the Territory on a bill of exceptions in the manner provided by the statutes of Hawaii, and said court overruled their said exceptions. *Territory* v. *Goto*, 27 Haw. 65.

From an order by the Supreme Court of the Territory overruling exceptions there is no right of appeal or writ

of error, and no method of having the order reviewed in any other court except by writ of *habeas corpus*. *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429; *Spreckels* v. *Brown*, 212 U. S. 208.

If a right to an appeal or writ of error from the action of the Supreme Court of the Territory of Hawaii existed, it has been lost, and had been lost when the application was made to the United States District Court for relief by *habeas corpus*.

The Supreme Court of Hawaii has repeatedly held, in civil as well as in criminal cases, that no writ of error can be taken after the six months elapsed. *Territory* v. *Wills*, 26 Haw. 478; *Ami* v. *Parke*, 7 Haw. 214; *Hennessy* v. *Bolles*, 2 Haw. 184; *Bowler* v. *McIntyre*, 9 Haw. 306.

After the exceptions had been overruled it was too late, under Hawaii Rev. Laws 1915, § 2518, to take the case to the Supreme Court of Hawaii by writ of error, and besides, that court, in dealing with the exceptions, had already decided against appellants the very point herein involved. When the petition for *habeas corpus* was filed in the United States District Court more than a year had elapsed since appellants had been sentenced by the Territorial Circuit Court.

Unless *habeas corpus* is available appellants are without a remedy, notwithstanding the prohibition of the Fifth Amendment and the provisions of §§ 755 and 761 of the Revised Statutes.

Under the exceptional circumstances of this case the United States District Court of Hawaii was authorized to grant and should have granted the relief sought by appellants through *habeas corpus*.

A person restrained of his liberty by the judgment of a court which is without jurisdiction is not barred from release by the writ of *habeas corpus* because he might have secured such relief by a writ of error but failed to

apply for it until it was too late. *Stevens* v. *McClaughry*, 207 Fed. 18; *Ex parte Craig*, 282 Fed. 138.

The following propositions are sound:

1. The United States courts have the power to grant relief by *habeas corpus* even when a state court having the applicant in custody has not finally determined the case, but do not exercise that power except "in cases of peculiar urgency," or "under special circumstances requiring immediate action." *Markuson* v. *Boucher*, 175 U. S. 184; *Ex parte Royall*, 117 U. S. 241.

2. After there has been a final determination by a state court of last resort, the general practice is to leave the defendant to his remedy of review by writ of error; but there is a discretion in a federal court to which the application for writ of *habeas corpus* is made to determine "whether under all the circumstances then existing . . . the accused shall be put to his writ of error from the highest court of the State, or whether it will proceed by writ of *habeas corpus*." *Ex parte Royall*, 117 U. S. 241; *In re Frederich*, 149 U. S. 70; *Urquhart* v. *Brown*, 205 U. S. 179; *Appleyard* v. *Massachusetts*, 203 U. S. 222. See *Riggins* v. *United States*, 199 U. S. 547.

3. The discretion referred to is "a legal discretion to be controlled in its exercise by such principles as are applicable to the particular case in hand," *New York* v. *Eno*, 155 U. S. 89; and "to be subordinated to any special circumstances requiring immediate action." *Ex parte Royall*, 117 U. S. 241.

4. In a case where there is no right to review the decision of the highest state court by appeal or writ of error, there is no room for the exercise of discretion, and the federal court applied to must grant the writ of *habeas corpus*, since by denying it the applicant would be cut off from his only method of asserting his rights under the Constitution and §§ 755 and 761 of the Revised Statutes. *Markuson v. Boucher*, 175 U. S. 184; *In re Chapman*, 156

U. S. 211; *Riggins* v. *United States*, 199 U. S. 547; *Frank* v. *Mangum*, 237 U. S. 309.

5. This Court has approved relief by *habeas corpus* in a number of cases in which the circumstances calling for it were less persuasive than in this case. *Appleyard* v. *Massachusetts*, 203 U. S. 222; *Medley, Petitioner*, 134 U. S. 160; *Savage, Petitioner*, 134 U. S. 176; *Matter of Heff*, 197 U. S. 488; *Hawaii* v. *Mankichi*, 1 Estee's Rep. 304; s. c. 190 U. S. 197; *Minnesota* v. *Barber*, 136 U. S. 313; *In re Loney*, 134 U. S. 372; *In re Neagle*, 135 U. S. 1; *Minnesota* v. *Brundage*, 180 U. S. 499.

6. A conviction and punishment under an unconstitutional law is no more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law. *Nielsen, Petitioner*, 131 U. S. 176; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Lange*, 18 Wall. 163; *Ex parte Yarbrough*, 110 U. S. 651.

Mr. Frederick Milverton, with whom *Mr. Frank E. Thompson* was on the brief, for appellee.

Mr. Solicitor General Beck and *Mr. Geo. Ross Hull*, Special Assistant to the Attorney General, by leave of Court, filed a brief on behalf of the United States as *amici curiae*.

Mr. Justice Van Devanter delivered the opinion of the Court.

This is an appeal from a judgment of the District Court of Hawaii refusing a writ of *habeas corpus* sought by thirteen persons in custody under a judgment of conviction in a territorial circuit court on an indictment for an infamous crime against the laws of that Territory.

In stating the offense, the indictment used the disjunctive "or" in several instances where the conjunctive "and" doubtless would have been used by an attentive

draftsman. Had the matter introduced by the disjunctive been omitted in each instance, or had it been introduced by a conjunctive, the indictment plainly would have stated an offense against the statute under which it was drawn. But in the latter of these situations the accusation and the range of admissible proof would have been broader than in the former. The indictment was not assailed in the circuit court because of any uncertainty in the accusation. On the contrary, the defendants and their counsel stipulated in writing with the prosecuting officer that the indictment should be "considered and understood" as "reading in the conjunctive instead of in the disjunctive"; that it should be taken as "not uncertain" and that any defect arising from the use of the disjunctive was waived. The circuit judge endorsed his approval on the stipulation, and it was filed in the cause; but no change was made in the indictment itself. The trial was had thereafter, counsel and the court proceeding as if the disjunctive rightly should be construed and understood as a conjunctive.

After conviction, the petitioners took the case to the Supreme Court of the Territory on various exceptions reserved to rulings in the course of the trial. In that court one of their attorneys contended, over the disapproval of another, that the indictment was made so uncertain by the use of the disjunctive that it did not inform the petitioners of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution, and that the stipulation was void under the Fifth Amendment because the indictment was thereby amended without a resubmission to the grand jury. The Supreme Court, referring to these contentions, said:

"We are of the opinion that the stipulation in question can not be construed as amounting to an amendment of the indictment. The trial court did express its approval of the stipulation and of the waiver contained therein, but

it did not amend the indictment or attempt or purport to do so. . . . If it might under other circumstances reasonably be said that, by reason of the allegations in question being in the disjunctive instead of the conjunctive, there was some doubt as to what crime defendants were charged with, does it not expressly appear in this case that not a vestige of doubt exists, when the defendants themselves have distinctly and unequivocally said, and their counsel learned in the law have solemnly stipulated and agreed in writing, that neither the defendants nor their counsel had any doubt whatever of the nature of the accusation against the defendants?"

And again, "As to whether, if an indictment palpably stated no offense at all or the semblance of any offense, an accused could waive his right to be informed of the nature and cause of the accusation against him, under the facts in the present case we are not required to say. There are, indeed, many authorities to the effect that an indictment which, in seeking to inform the accused of the nature and cause of the accusation against him, charges the offense in the disjunctive instead of the conjunctive, is bad, upon the theory that it charges no offense at all. But, as pointed out in *Territory* v. *Kim Ung Pil*, 26 Haw. 725, even the courts which so hold concede that the rule is not without qualifications. Its merits need not be here considered. . . . When, as in the case at bar, the defendants and their able counsel have solemnly said to the court, after ample time for study and reflection, that they understand the indictment, that the presence of the word "or" does not mislead them or in any wise embarrass them in their defense and that the indictment fully informs them of the nature and terms of the charge against them, the alleged insufficiency or defectiveness of the indictment is one which may be constitutionally waived. Any other conclusion would, we think, be an affront to justice and common sense."

The Supreme Court overruled the exceptions, but did not render a judgment of affirmance, for under the local law that was not admissible in cases brought before the court only on exceptions reserved. Therefore that decision could not be brought to this Court for review. *Cotton* v. *Hawaii*, 211 U. S. 162; *Hutchins* v. *Bierce*, 211 U. S. 429. But had the petitioners so chosen, they could have taken the case to that court on writ of error instead of on the reserved exceptions, and in that event a judgment of affirmance, if involving the denial of a right asserted under the Constitution, could have been brought by writ of error to this Court for review in regular course. *Spreckels* v. *Brown*, 212 U. S. 208. The petitioners, however, elected to proceed the other way.

With this statement of the situation and proceedings in the territorial courts, we turn to the petition for *habeas corpus* presented in the District Court. In it the petitioners set forth the indictment, the stipulation and the judgment of the trial court, and then took the position, first, that the use of the disjunctive rendered the indictment so uncertain that it did not meet the requirement of the Sixth Amendment to the Constitution, and, secondly, that the stipulation effected a change in the indictment without a resubmission to a grand jury and that this was in contravention of the Fifth Amendment. The District Court denied the petition on the ground that the case was not one in which the relief sought should be awarded.

In the federal courts a discharge on *habeas corpus* of a prisioner held to answer a criminal accusation or confined under a judgment of conviction is granted only in the exercise of a sound judicial discretion. *Salinger* v. *Loisel, ante*, 224; *Storti* v. *Massachusetts*, 183 U. S. 138, 143. The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law

has provided another remedy in regular course, are exceptional and usually confined to situations where there is peculiar and pressing need for it or where the process or judgment under which the prisoner is held is wholly void.

This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not for that reason void, *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Parks*, 93 U. S. 18, 20; *Ex parte Yarbrough*, 110 U. S. 651, 654, but subject to correction in regular course on writ of error. If the questions presented involved the application of constitutional principles, that alone did not alter the rule. *Markuson* v. *Boucher*, 175 U. S. 184. And, if the petitioners permitted the time within which a review on writ of error might be obtained to elapse and thereby lost the opportunity for such a review, that gave no right to resort to *habeas corpus* as a substitute. *Riddle* v. *Dyche*, 262 U. S. 333. And see *Craig* v. *Hecht*, 263 U. S. 255.

The petitioners rely on *Ex parte Bain*, 121 U. S. 1, where it was held that an actual amendment of an indictment for an infamous crime without a resubmission to the grand jury rendered the indictment void and left the court without power to proceed to a trial. But, as was said by the Supreme Court of the Territory, the indictment here was not amended. The purpose of the stipulation was not to alter or change the indictment but to show that the parties construed and understood the accusation in a particular way and desired the court to do

the same. Had the court done so without the stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects.

We find no special circumstances in the case which should have required the District Court, in the exercise of a sound judicial discretion, to discharge the petitioners.

Judgment affirmed.